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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH AND JOSEPH BUSCH,

APPELLANTS,

VERSUS

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO,

APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

The original complainants in this suit, were William Shepard, Charles McLeish and Leonard Carr. Since 1878, until a short time after this suit was begun, these complainants owned a tract of about forty acres of land situated in this county, just outside of the corporation limits of Columbus, on

East Broad street. At the last named time Carr sold and transferred his interest to Thomas McLeish and Joseph Bush, who were substituted in place of Carr. The defendant is the treasurer of this, Franklin county, Ohio.

March 26, 1890, the legislature enacted a law which authorized county commissioners in certain counties, this being one of them, to improve roads which extended from cities in said counties, and which had been paved therein, by paving them with granite, or other stone block, asphalt or other permanent material. (87 Ohio L., 113).

This statute also authorized and commanded the county commissioners to assess the cost of such improvements equally on the abutting property by the foot front, to not a greater depth than two hundred and fifty feet. It also authorized them to issue bonds to pay for the cost, to be paid out of the assessments.

The most pertinent sections of the statute, are as follows:

Section 1. Be it enacted by the General Assembly of the state of Ohio, that in counties in which there are cities of the first grade of the second class, county commissioners shall have authority to cause any of the streets or avenues, or parts thereof of said cities which may have been paved with granite or other stone block asphalt or other permanent material to the limits of said city, to be extended beyond the limits of said cities and improved by paving as aforesaid, or to cause any other road or street within said counties to be so improved upon the following conditions, to wit:

Section 2. The property owners of lands fronting upon such road, street or streets being desirous of having said road, street or streets extended and so improved beyond the limits of said cities, or any other road, street or streets within such counties so improved, shall petition said commissioners to have said street or streets extended, widened and so improved, as

called for in said petition; said petition shall state therein with what material said street shall be paved, provided with sidewalks, gutters and other passages for carrying off the water, and stating therein to what point on said road or street said improvement is to be extended, or between what points on such other road or street such improvement is to be made. No petition for the improvement of any road or street under the provisions of this act shall be favorably considered by said commissioners unless it is signed by the property owners representing a majority of the feet frontage of the lands abutting upon said road or street, between the city limits mentioned therein and the point designated in said petition where said improvement shall stop, or the points upon such other road or street where said improvement shall begin and end, and the distance between such points shall be mentioned by the number of feet upon the line of said road or street.

Section 3. Whenever the commissioners of such county shall receive such petition, they shall appoint a time and place for the hearing of said application, not less than four weeks thereafter, publish a notice of such hearing in some newspaper of general circulation in the vicinity of the proposed improvement, for not less than two consecutive weeks, once each week, and cause service of said notice to be given to all owners of property fronting upon the proposed improvement, their agents or attorneys, at least two weeks before said hearing.

Section 4. All owners of lots or lands bounding or abutting upon the proposed improvement claiming damages therefor, shall file a claim in writing with said county commissioners, setting forth the amount of damages claimed, together with a description of the property owned for which the claim is made, within one week after the expiration of the time required for (the) publication of said notice, and all such as shall fail or neglect to file their claim for damages aforesaid, within the

time aforesaid, shall be deemed to have waived the same, and be forever barred from filing any claim or recovering any damages therefor.

Section 5. Upon the day appointed for said hearing, if no claim for damages or for appropriations have been filed, or if whatever claims have been filed are allowed by the commissioners as hereinafter authorized, the hearing may proceed, and if, upon such hearing, the county commissioners shall be satisfied that the owners of a clear majority of the feet front of land abutting upon said proposed improved roadway favor said improvement, and that the proposed improvements are judicious, it shall be their duty to declare said improvement authorized and established, and to declare the width of said road legalized and established, as of the dimensions and manner as prayed for in said petition, and to make a permanent record of their said action. When said action is taken by the county commissioners they shall immediately notify the county surveyor of their action; said commissioners shall have authority to allow claims as presented or as may have been acted upon. They shall also have authority to sit as arbitrators, and hear all claims arising out of such proposed improvements. They may subpoena witnesses and hear testimony, and upon final hearing shall find and determine the amount, if any, fairly due the claimant, or that claimant is entitled to no damages, *and their finding shall be conclusive.*

Section 6. It shall be the duty of the county surveyor, upon receiving such notice from the county commissioners that such a road has been widened, or other improvements authorized, to survey such road, erect stakes or monuments in front of each piece of property, marking the outside lines of such road so widened or extended, and do whatever other work (may be) necessary for said improvement, as ordered by said commissioners. *It shall be the duty of said commissioners to assess*

all claims allowed by them for the establishment and widening of said street or streets upon the property fronting on such road so improved by the foot front. All other expenses for said improvement, except building bridges and culverts, which shall be paid out of the county bridge fund, shall be paid for and assessed upon the property abutting upon said street, *not however, to a greater depth than two hundred and fifty feet,* in accordance with the various provisions of law now enacted or hereafter enacted applicable thereto, and not inconsistent with this act."

In May, 1890, the county commissioners of this county ordered Broad street, which was then paved with asphalt in this city, to be extended about 4300 feet beyond the city limits, by paving it with asphalt. In the month of August they contracted for such paving; by October 1, 1891, the improvement was completed; and a short time after this the cost of the improvement was assessed upon the abutting property.

The frontage of appellants' property was 1119 feet, and it was assessed with $12,586.07. This parcel of land, 1119 feet long and 250 feet wide, contained 6 42-100 acres. The assessment levied on it amounted to $1960.45 per acre. This property was country property; it has never been subdivided into lots; it has never had any improvement on it, except a few shells of buildings used for ice houses. (Page 99, of Record). *The assessment was tantamount to a confiscation of the property. At the time of the assessment it was not worth as much as the amount of the assessment, nor has it been worth that much at any time since then.*

The appellants have paid on the assessment in principal $8810.27, and they have paid interest on the assessment $3170.95, making a total of $11,981.22. There is remaining unpaid of said assessment $4002.34, with some interest. The object of this suit is to obtain a release from the payment of the balance of the assessment.

The court will observe, from this statement, which will not be controverted, that our clients are not persons whose property has been benefited by a public improvement, and who are seeking to make the public pay the expense and cost of it.

ERRORS OF THE CIRCUIT COURT.

The decision of the Circuit Court was adverse to the complainants below, the appellants here.

The court refused to adjudge that the assessment was illegal; or that it was a violation of the constitutional rights of the appellant. It found and determined that the appellants were estopped, by their conduct, from maintaining their suit, and for that reason, and that reason alone, dismissed their bill.

These conclusions of the Circuit Court have been assigned as errors.

I.

THE ASSESSMENT WAS ILLEGAL.

We claim that the assessment was illegal, and that the law under which it was levied was unconstitutional. We claim that the property of the appellants, under the guise of an assessment, was taken for public use without just compensation. We claim that the assessment was so ascertained and levied that the complainants were denied due process of law. We claim that the assessment exceeded, by several thousand dollars, all possible special benefits derived from the improvement by the land. We claim that the property of appellants was confiscated.

The evidence in the record conclusively proves that the assessment exceeded, by several hundred dollars per acre, the actual market value of the property of appellants assessed.

The assessment was levied by the foot front rule. After making the admission that it was assessed by the foot front, the answer alleges that it was also levied according to special benefits.

Our first answer to this contention of the defendant is, that an assessment levied by the arbitrary mode of foot frontage, could not have been levied according to special benefits. These two facts are irreconcilable; in an assessing process they can not coexist and cohere.

In the Norwood vs. Baker case, 172 U. S., 269, the assessment was levied by the foot front method. The village of Norwood had the option to levy it by that mode, or by the ad valorem mode, or in proportion to special benefits. The first named method was adopted.

Justice Harlan said:

"The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits." This is so plain that argument is unnecessary. The levy of an assessment by the arbitrary mode of foot frontage in itself imports that special benefits were not, and could not have been, considered.

The case of Fay vs. Springfield, 94 Fed. Rep., 409, furnishes an apt illustration. The assessment was levied by the foot front rule. After quoting from an opinion of the Supreme Court of Missouri, Judge Philips said:

> "Language could not more forcibly emphasize the fact, not only that the front foot rule is arbitrary, regardless of the respective benefits to the property touched, but that it admits of no contention that the party assessed is not benefited at all."

The defendant, in his answer, explains what he means by claiming the assessment was made according to special benefits. The seventeenth section of the statute contains this provision:

> "In no case shall said commissioners take action for the improvement of any road under the provisions of this act, until after they shall have made a personal inspection and examination of the line of said proposed improvement, and are satisfied that with such improvement the foot frontage of the land abutting thereon will be well worth double the estimated expense of said improvement, which inspection, examination and estimate, together with their present valuation per foot front of said land shall be by said commissioners made a matter of record, and no improvement shall be by them ordered, unless said record justifies it."

But this did not authorize them to make the assessment in proportion to special benefits.

The eighth section ordained the mode of making the assessment. The last half of the section reads:

> "When the whole work is done, the amount of the bonds sold to pay for the same and the interest thereon to the next interest day, when the assessment can be collected as hereinafter provided to pay the same, shall be taken as the cost of the said improvement, to be paid by the abutting property owners, *and that amount shall be assessed equally by the foot front on property fronting or abutting on the said improvement.*"

Section 6 contains a similar mandate.

But even, if these provisions were absent from the eighth and sixth sections, the seventeenth section does not contain a single feature of a law requiring an assessment to be made in proportion to special benefits. It did not require the commissioners to determine what special benefits would be conferred upon the property by the improvement. It did require them to determine whether the frontage of the lands with the improvement, would be worth double the estimated cost of the improvement. The commissioners, in this case, made a finding that the frontage of the land was worth on an average, $20 per foot, before the improvement, and that it would be worth, on an average, $40 per foot front after the improvement was made. That was not a compliance with the statute.

But suppose it was; it was not an assessment of the property according to special benefits. For aught that anyone knows, the commissioners may have reached the conclusion that the frontage would be worth $40 a foot after the improvement, *on the ground that the general benefits derived from the improvement would enhance its value to that extent.*

The Supreme Court of Ohio, in Chamberlain vs. Cleveland, 34 Ohio St., 551, furnished the test for determining whether special benefits were considered in making an assessment.

The assessing officers, the court said, must undertake to determine the *amount, the value,* of the special benefits conferred, both in respect to the *amount assessed and the apportionment of the burden.*

On page 567, Judge Gilmore said that the only thing in the city council's record which indicated that this had been done, was in the report of the assessing board that the assessment is "upon property benefited." And then he adds this comment:

> "But this, of itself, is of no effect. It lacks the essential elements of valuation and apportionment, above spoken of, without which the assessment may be arbitrary and oppressive. Presumption, if permitted in favor of the validity of any part of the proceedings, cannot be permitted to supply the essential elements of a valid assessment that are wanted here."

II.

THE STATUTE DEPRIVED THE PROPERTY OWNERS OF DUE PROCESS OF LAW.

But there is still another answer to the claim that this statute provided a mode for assessing the property in proportion to benefits. There is no provision made by the statute anywhere for notice to the property owners and for an opportunity to them to be heard and make objections on the question of benefits; nor is there any authority conferred upon the commis-

sioners to receive and consider evidence on that question. The guaranty of due process of law was violated by the statute.

We maintain the principle, and so plant ourselves firmly upon this proposition, that somewhere in the statutory proceof assessing by the proper officials, sometime before the amount of the assessment is finally and irrevocably fixed, the statute must provide for notice to be given to the owners and for an opportunity for them to be heard and make objections. In some form or manner they must be allowed to defend their interests. As the liability to pay assessments, when laid, is the most peremptory of all pecuniary liabilities, it is most important, that the assessment which is the basis of said liability, and which determines its amount, should not be fixed irrevocably, without notice, and without opportunity, to be heard. If a statute should authorize a judgment to be recovered by which the defendants' property would be liable to seizure on execution, without any notice to him, or opportunity to defend himself, the statute would be confessedly void as being without due process of law. So also a statute which authorizes an assessment to be made, by which the property owner's property becomes liable to sale, without any notice to him, or an opportunity to be heard, or any means given to him for allegation, review or correction, would be equally void. The two cases are not only parallel; they are identical.

We insist that a statute which authorizes a board of county commissioners, in the first instance, as this statute did, to lay an assessment upon an owner's property, without giving him any notice, or an opportunity to be heard, to make allegations or suggest corrections, which makes that assessment final and conclusive, which provides no mode of review or appeal on his behalf, which thus puts him absolutely at the mercy of the arbitrary discretion of the board; which fixes upon him a liability before he has any knowledge, or means of knowledge, of

its extent, and from which there is afterward no escape, and ch may be enforced by judicial sale of his property—such a tute violates the constitutional guarantee—it deprives the ner of his property without due process of law. This conclusion is self-evident, unless the power of assessment is without restriction, is uplifted above constitutional prohibitions, and the property owner is without redress and protection.

The other side will probably argue that the statute does make provision for notice and hearing. Section 3 of the act will be appealed to. It reads:

> "Whenever the commissioners of such county have received such petition" (that is, the petition for the improvement) "they shall appoint a time and place for the hearing of said application, * * * publish a notice of such hearing in some newspaper, * * * and cause service of said notice to be given to all owners of property fronting upon the proposed improvement, their agents or attorneys, at least two weeks before said hearing."

It is obvious that this section only makes provision for notice and hearing of the application for the improvement of the road or street. It is silent as to notice and hearing of a question of assessment in proportion to the benefits. Besides, Section 17, in express terms, excludes the right to hear any evidence, or objections. It expressly requires the commissioners to make a personal inspection and examination of the line of the proposed improvement. It is upon, and from, this personal inspection and examination that they must form their conclusion. The statute is dumb on the subject of hearing evidence by them, or the offering of evidence by any property owner. Neither Section 3, nor Section 17, gives the property owner an opportunity to file objections, to make suggestions, or offer evidence.

The statute is, moreover, silent on the subject of the review of, or appeal from, the conclusion of the commissioners upon the question, whether the property has been benefited, or whether the frontage, with the improvement, would be worth

double the estimated expenses. Due process of law was denied to these complainants by this statute.

The case of Charles vs. City of Marion, 98 Fed. Rep., 166, illustrates this argument. The controversy was about the assessment for the cost of improving an old and established street. The provision for levying the assessment was that the council should cause a final estimate of the total cost to be made by the city engineer; that the engineer should report to the council the total cost, the average cost per running foot front, the name of each property owner, the number of front feet owned by each, and the amount of cost due upon each lot or parcel of ground. The amount was required to be ascertained by multiplying the average cost price per running front foot by the number of running front feet of the several parcels of ground chargeable. Next, the council was required to give notice of the time and place of hearing of said estimate before a committee of the council. The committee was required to make a report recommending the adoption or rejection of the estimate, which the council was at liberty to adopt, alter, or amend. Superficially, this would seem to provide for notice and an opportunity to be heard. But Judge Baker did not so conclude. He said:

> "It is suggested in argument that the notice and hearing above provided for is such notice and hearing as constitute due process of law. * * * The statute does not purport to confer authority upon the common council to institute an inquiry de novo, and to hear witnesses and consider testimony for the purpose of fixing the assessment upon the basis of the actual benefits received by the property of the land owner by the construction of the public improvement. It is elementary that the constitution authorizing the assessment and levy of taxes is not self-executing. It must be carried into execution by appropriate legislation, and no taxing officer or taxing body can make a valid assessment, unless they pursue with reasonable strictness the precise method prescribed by the statute.

There is no provision of the statute of this state called to the attention of the court which points out the method, or confers authority upon a common council to hear and determine the question of actual benefits received by the property of the land owner by the construction of a street improvement. It is not sufficient to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law, to hear and determine the question involved. If the hearing had before the common council was to determine the benefits actually received by the property owner, it is strange, indeed, that the statute commands the engineer to make and report his assessment and estimate upon a basis which wholly disregards, *and in effect, forbids his considering the question of benefits at all.* In my opinion, there is no provision of the statute that provides a tribunal and clothes it with power, and points out the method of its procedure, with the purpose of ascertaining and determining the benefits actually received by the property of the land owner by the construction of a street improvement."

This is a perfect photograph of the statute under which the assessment in question was levied. That statute makes no provision for notice and hearing of the question of benefits; it does not clothe the commissioners with power, by methods and rules, to hear and determine that question.

The evidence of Walter Braun, the engineer, shows that he was the officer who, like the Indiana engineer, made the assessment. He extended the assessment on the assessment roll; and he did it by computing the assessment against each property owner in the proportion that the linear feet of his frontage bore to the linear feet of the frontage of all the parcels of land assessed. (Page 85, of Record). He made the assessment upon a basis which wholly disregarded, and in effect, forbade his considering the question of benefits at all.

One of the questions decided by the United States Court, in Indiana, was decided by another court, as far back as 1882.

We allude to the case of the County of San Mateo vs. The Southern Pacific Railroad Company, 13 Fed. Rep., 722, decided by Justice Field and Judge Sawyer. The seventh paragraph of the syllabus is couched in this language:

> "Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceedings will want the essential ingredients of due process of law."

The discussion of the question by Justice Field begins on page 748 and ends on page 753; and by Judge Sawyer, it begins on page 762 and ends on page 766. This decision is decisive of the question under consideration.

Assuming that the county commissioners had the power to levy the assessment in proportion to special benefits (which we do not concede at all), the fact that the statute made no provision for a notice and hearing of that question, makes it clear that the property owners were deprived of due process of law. Therefore, the finding, the conclusion, of the commissioners on that subject was not binding upon, and conclusive against, these appellants.

Another consideration is pertinent. As was stated by Judge Philips in Fay vs. Springfield, supra, there are three questions which have to be decided when an assessment is made in proportion to benefits.

(1) Were the lot owners benefited at all by the improvement?

(2) If there were general and special benefits derived from the improvement, what was the value of the general benefits, and what was the value of the special benefits?

(3) Were the special benefits to the property owners equal or unequal, and if unequal, how much was the relative amount of each?

The statute under consideration makes absolutely no provision for such determination.

III.

THE DECISION IN NORWOOD vs. BAKER, 172 U. S., 269, APPLIES.

The next question is, Do the principles of the decision in Norwood vs. Baker apply to, and rule, this case? There was no property of the complainants' appropriated in a condemnation proceeding, and the cost of it assessed back on this land. There was, however, land of Frederick Miller and E. Bennignus, other abutting property owners, appropriated, and the compensation and damages awarded to them, amounting to $1850, were assessed as a part of the cost of the improvement. Opposite counsel may contend that there is no proof of this statement. But the answer admits that $1250 was allowed to Miller and $600 to E. Bennignus, for their land; the evidence proves this (see pages 90 and 91 of the Record); *and inasmuch as the statute (Sec. 6) commanded the commissioners to assess such claims, as part of the cost of the improvement upon the abutting property, we have a right, in the absence of contrary evidence, to infer that it was done.*

However, for the purpose of this argument, we are going to concede that the difference between this and the Norwood-Baker case, is that there is, as to the appellants, no condemnation feature in this case. But, upon principle and reason, that should make no difference in the decision of the case. If the law is a system of reasons, if it is composed of legal principles, if the adjudications of the courts are only witnesses of what

the laws are, the fact, that the facts of this case are not exactly like those in the Norwood-Baker case, is a matter of supreme indifference.

In that very case this court, itself, by clear implication, refutes the notion that its decision was only intended for a precedent in a case where property was condemned and its cost assessed back upon the property. The opinion of Justice Harlan states that the views of the court are supported by other adjudged cases, as well as by reason and principle, and he cites them, the court thereby approving them. They are:

> Agens vs. Mayor, Etc., 37 N. J. L., 416;
> Bogert vs. City of Elizabeth, 27 N. J. Eq., 568;
> Hammett vs. Philadelphia, 65 Pa. St., 146;
> Barns vs. Dyer, 56 Vermont, 469.

In not one of these cases was there any condemnation feature. In the first one the assessment was for the cost of repairing an old road bed; in the second, for the cost of a wooden pavement made on an old road bed; in the Pennsylvania case, for an improvement made on an old and established road; in the Vermont case, for the cost of a sidewalk built on an old street.

In the dissenting opinion, in the Norwood vs. Baker case, Justice Brewer declared that the rule which the majority announced would apply to an assessment for grading, macadamizing or paving a street, as well as to one for the cost of opening or laying out a new street.

In Fay vs. Springfield, 94 Fed. Rep., 409, the assessment was laid, by the foot front rule, to pay the cost of repaving an established and old street; and Judge Philips said:

> "I am unable to perceive why this case is not controlled by the rule of the Supreme Court in Village of Norwood vs. Baker, 172 U. S., 269."

If authority can establish the truth of a proposition, certainly we have assembled enough authorities to demonstrate that the

rules and principles of the Norwood-Baker case, should rule this case. But it seems to us, after all, that authority was not necessary to justify the application of the decision in Norwood vs. Baker to this case at bar.

The case is a precedent for every proposition that was either consciously or unconsciously in the mind of the court. The doctrine of the case is its essence; it is a precedent for its doctrine. The doctrine of a case is a general proposition of law from which the decision, under the illumination of the facts of the case, flows. The doctrine of the case is the basis of the decision. The doctrine of the case is not the language of the judge who wrote the opinion; it is the principle of the case. A conclusion is often a necessary inference of the decision, but necessarily assumed and implied in the course of the decision. The authority of such a decision in establishing a rule, especially when the decisions are numerous and carefully considered, is often as weighty as that of a direct affirmative assertion.

Live Stock, Etc., Ass'n., vs. Crescent City, Etc., Co., 1 Abb. N. S., 338.

Applying these well known criteria, it is self-evident that the decision in Norwood vs. Baker should not be limited to cases in which the property was condemned and the compensation and damages awarded for the land was assessed back upon the property.

IV.

THERE HAS BEEN NO REVERSAL OF THIS CASE.

So far as this case at bar is concerned, the decision in Norwood vs. Baker, supra, has not been reversed by the decisions of this court in French vs. Barber Asphalt Paving Co., 181 U. S., 324, and in eight other cases decided at the same time.

In French vs. Barber Asphalt Paving Co., supra, Justice Shiras, in discussing the "legal import" of the decision in Norwood vs. Baker, said:

> "It may be conceded that courts of equity are always open to afford a remedy, where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood vs. Baker."

Again, in Town of Tonawanda vs. Lyon, 181 U. S., 389, the same justice said:

> "The case of Norwood vs. Baker, presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting in the opinion of a majority of the judges of this court, *to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment.*"

(a) It is undisputed, in the case at bar, that strips of land were taken for the purpose of widening the street from the lands of Miller and Bennignus; that one of them was allowed $1250, and the other $600, and the record shows that the strip of land belonging to each of them was, "appropriated for the widening of the said street." (Page 91 of the record.)

These two sums of money were added to the cost of the improvement, and assessed back upon *all* the lands of the abutting property owners, including appellants.

(b) In the French-Barber case, one of the reasons assigned by the Supreme Court of Missouri, and adopted by the Supreme Court of the United States, for the conclusion was, that "all of the lots are substantially on the grade of the street as improved, and *are similarly situated with respect to the asphalt pavement. * * * There is no showing that there is any difference in the value of any of the lots abutting upon the improvement.*"

This was not the condition of the abutting lands that were assessed to pay for the improvement in the case at bar. The undisputed testimony shows that the land of the appellants was damaged by the improvement of the road or street. In order to elevate the land to a level with the grade of the road, they expended $5000 for dirt. This is testified to by Dr. Shepard (pages 61 and 62 of the record), and not disputed.

On page 38 of the record another witness testified that, nearly along the whole front of appellants' property, the street was raised above their property, "10 or 12 or 14 feet," and that they (appellants) "put in nearly 70,000 yards of dirt there at an expense of nearly $5000.00, if not quite." By the same witness it was proved that the street was elevated, before the improvement, above their land, and that the previous elevation and the elevation caused by the improvement aggregated "probably 18" feet.

On page 40 and 41 of the record will be found the answers of this witness to questions as to the difference in value between the property of the appellants and other abutting property. He said that the property of the appellants was "worth less per foot than the property east of it."

Another witness testified that the property belonging to the Bullitt Syndicate, or Columbus Land Association, (interchangeable names), having a frontage of about 2500 feet, and being about one-half of the whole frontage along the improved road, and lying east of the land of the appellants, "got all the benefit, or nearly so, in that—nearly all the benefit—all the special benefit; that is, by the change of grade," caused by the improvement of the street. (Record 22.)

The appellee not only did not dispute the testimony of the appellants, showing that there was a difference between the value of the property of the appellants and other abutting property along the improvement, but his evidence corrobo-

rates that of the appellants. One of his witnesses testified that he "would not have paid the same price for it" (the property of the appellants) as he did for his own, which was situated farther east; because he said "it was lower and there was too deep a grade made there." He further testified that his own property, which was a lot one hundred feet wide, was so situated, after the improvement was made, that it was "nice terrace property," and that it "would not be necessary to lower it any," for residence purposes; and further that the "average" of at least half the frontage along the improvement, beginning at the east end, was "in a desirable shape." That is to say, the land of the appellants was not as valuable as his own, and therefore that the average of all the lands along the east end was more valuable than the land of the appellants. The land of the appellants was situated on the extreme west end of the improvement. (Page 97 of the record.)

Another witness of the appellee testified that "the property east * * * is more valuable because it is higher." (Record 105.)

(c) The highest value that was put upon the property of the appellants by anybody, and he was not a witness in the case (Keyes or McCalla), was $1500 per acre. (Page 30 of the record.)

Morrison testified that it was worth, before the improvement, $1000 per acre; and that it was worth only $1200 an acre after the improvement was made. (Page 21 of the record.)

Denmead testified that the land of the appellants, which was assessed, was worth, before the improvement was made, "about $700 an acre"; and that it was not worth any more after the improvement was made. (Page 50 of the record.)

Charles McLeish testified that the same land, before the improvement was made, was worth $700 or $800 per acre, and that the improvement did not enhance its value more than $100 per acre. (Page 37 of the record.)

Another witness, Orebaugh, testified that the land, before the improvement, was worth $30 a foot, which, by calculation, would not make it exceed $600 per acre; and that the improvement only enhanced its value to $60 per foot, and, further, that if the appellants' land was assessed to an amount over $12,000, and if they had paid over $8000 of it, they had paid for all the special benefits from the improvement. (Pages 59 and 60 of the record.)

Another witness, Tallmadge, testified that the land was worth, before the improvement, $500 an acre, and that the improvement of the road did not add anything to its value. He did not explain fully, but it sufficiently appears from his testimony that the reason there was no increase in the value was because the appellants had to make such a large fill in order to offset the damage that had been done to the property by the elevation of the road above it. (Record 79.)

We submit that the overwhelming preponderance of the evidence shows that the property of the appellants was assessed far in excess of the special benefits derived by it from the improvement of the road; that the abutting property along the east end of the improvement was of more value than the land of the appellants; that there was so much difference in value between them that a uniform assessment was unequal and unjust; that an apportionment of the assessment among the different abutting properties, in proportion to the relative special benefits, derived by them from the improvement, would have required a larger assessment upon the property at the east end of the improvement than the property at the west end, including that of the appellants.

The admitted and proved facts make it obvious that apellants were deprived of their property without due process of law.

The evidence proves more than this. It proves that the assessment levied upon the property of the appellants exceeded the actual value of the property.

(d) It is not disputed by anybody that the land of the appellants which was assessed did not exceed 6½ acres. (Page 38 of the record.) It is not disputed, but it is admitted by the answer of the appellee, as well as proved by the evidence of the assessing officer (page 85 of the record), that the assessment per foot front, which was levied, amounted to $11.25 per foot front. It is not disputed, but admitted, that the amount assessed upon the property of the appellants was $12,586.07. (Pages 4 and 10 of the record.)

The answer admitted that the assessment was $11.2476 per foot front, only a fraction less than $11.25, and did not deny the aggregate amount of the assessment as stated in the bill, upon the property of the appellants, and therefore, it is admitted. The admitted frontage of appellants was 1119 feet, and a calculation makes the number of acres stated. The aggregate assessment of $12,586.07 divided by 6½ acres, would make the assessment reach the rate of $1936.62 per acre. This is a mathematical demonstration that the assessment per acre exceeded the actual value of the land, after the improvement was finished, by nearly $500, the land being worth at the time $1500 per acre, as was proved.

It is a mathematical demonstration that the property of the appellants will be confiscated to pay their proportion of the expense and cost of the improvement. After deducting from the actual market value of the land the amount of the assessment, there was not only nothing left to the appellants, but it will compel them to pay nearly $500 per acre more

than the value of the land, unless this court grants their prayer for relief; that is to say, relief from the payment of the balance of the assessment.

It is not disputed, but admitted, that the appellants have paid on the assessment $11,981.22 and that there is yet due on the assessment $4002.34. (Pages 4, 13 and 84 of record.) They have paid more than the value of the land, and more than the special benefits derived by the land from the improvement, and they ask to be relieved from the payment of the balance.

The proper method of proving the lack of benefits was adopted, and that was by proving that the market value of the property was not enhanced by the improvement. This was the only way to do it.

Chicago Union Traction Co. vs. City of Chicago, 68 N. E. Rep., 519.

These facts, which we have just enumerated, and which are proved by a decided preponderance of the evidence, clearly bring the case at bar within the ruling in Norwood vs. Baker, supra, and within the ruling in French vs. Barber Asphalt Paving Co., and Tonawanda vs. Lyon, supra, which we have illustrated by selections from Justice Shiras' opinion.

V.

ESTOPPEL.

The only real defense in this case is estoppel, and it has only a plausible basis.

We insist that there is no merit in the defense of estoppel. The acts, the conduct, of the appellants, which are sought to be made estoppel, lack the essential elements of estoppel. We do not intentionally and consciously look at these acts with the bias of a partisan. We have tried to take

a colorless view of them, and we are not willing to admit that a single one of them conforms to the established definitions of estoppel.

The decisions in State, ex rel., vs. Mitchell, 31 Ohio St., 592, and in Tone vs. Columbus, 39 Ohio St., 281, and other Supreme Court decisions of the state which have simply followed those decisions, have been enlisted to give countenance to the most extravagant claims of estoppel. "Active promotion" of an improvement, terms used in these cases, are so general and vague that almost any claim of estoppel may use them as a sanctuary. The complexion, the color, of those two cases, given to them by their peculiar circumstances, is often overlooked in considering them as precedents for estoppel. The board of improvement, in those two cases, was elected by the property owners themselves. The board was required, and had the power, to prescribe the kind of materials used in the improvement, the kind of pavement made, how the work should be done; it devised the plans; it superintended the work; it made the contract with the contractor; and it levied the assessments. The city was almost a stranger to the undertaking. The improvement was initiated, carried on, and completed by the property owners themselves. It is no source of wonder that the Supreme Court concluded that the city should not pay the assessment levied upon the property of the commissioners of the board of improvement and others who had "actively promoted" the improvement by voting for the commissioners of the board and by petitioning for the improvement. But it is a misnomer to call their acts estoppel. They were contractual acts. They made a contract for themselves with the contractor to construct the improvement, and, instead of styling it an estoppel, it should have been designated a contract voluntarily entered into with the contractor, and therefore, that they

should perform their own contract, and not ask the city to fulfill it for them.

But no matter what may be construed to be estoppel in the State Supreme Court, we assume that this court will follow Federal decisions, which may conflict with the decisions of the State Supreme Court on this subject.

In two cases, at least, this court has decided that to make the principles of estoppel available, either fraud, or its equivalent, culpable negligence, must be proved. We refer to the cases of Leathers M'frs. Bnk vs. Morgan, 117 U. S., 108; and Henshaw vs. Bissel, 18 Wall., 271.

In Lyon vs. Town of Tonawanda, 98 Fed. Rep., 361, (which was reversed, but not on the point for whose support it is cited now), Judge Coxe defines estoppel which may defeat an attack made upon an assessment in a case just like this. *The party who rests his defense upon estoppel must show that by having relied upon the other party's conduct, he has placed himself in such a situation that he would suffer a loss as the consequence of his action, if the other party were permitted to disown his conduct or its effects. The conduct claimed to be estoppel must have either benefited the one party or injured the other party.* The party making the defense of estoppel must have been induced by the conduct of the other to believe and act upon it, to his prejudice.

Estoppel is not a favorite of courts of equity. But we will quote Judge Coxe's own language:

> "Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendants relied upon the company's acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary, the pavement would have been laid precisely as it was laid if the Columbia Company had never existed. *No injury to the defendants or benefit to the complainants followed from these acts.* * * *

> Equity recognizes and tolerates estoppels, but it does not encourage them. She admits them into her domains, but they are usually regarded as undesirable aliens, having little in common with the other members of her family. Before saying to the suitor that his rights have been destroyed by his own acts, a court of equity should be certain of the rectitude of its position."

The decision in O'Brien vs. Wheelock, 95 Fed. Rep., 883, is another case upon which we shall largely rely; in fact, in the appropriate place, we shall endeavor to show that the decision there is decisive of the question of estoppel in this case.

We simply ask for an application of the principles enunciated in these Federal cases to the so-called acts of estoppel relied upon by the appellee in this case.

(a) Was there any fraud in the conduct of these appellants, or either of them?

(b) Did any of the acts of the appellants benefit themselves or injure the county commissioners for the county?

(c) Did the county commissioners rely and act upon any of the acts of the appellants, or either of them, to their prejudice?

(1) These appellants signed the petition for the improvement. Even in our own Supreme Court this act is no longer regarded as foreclosing a property owner's right to impugn an illegal assessment. In the face of the decision rendered by our Supreme Court in Birdseye et al. vs. Village of Clyde, 61 O. S., 27, it would be vain for the appellee here to contend that the signing of the petition by these appellants was an act of estoppel. We quote the applicable part of the syllabus:

> "The owner is not estopped to maintain such an action" (that is, an action just like this to invalidate the assessment) "by having acquiesced in the construction of the improvement, nor by petitioning therefor, and thereby consenting to the raising of a certain proportion of the

cost by assessment on all abutting property. By such act he binds his property for its proper share of a *legal assessment* for the cost of the improvement, *but no further.*"

In at least two respects that case is identical with this.

(a) The council of the village did not initiate the improvement; before it could act, a certain number of owners of property frontage had to petition for the improvement. Here, in the case at bar, the improvement proceeding could not be commenced, and was not commenced, until a petition by the owners of one-half of the feet frontage was presented to the commissioners. But the Supreme Court, in that case, did not deem the fact that the property owners initiated the improvement, as militating against their right to have relief against any illegal assessment.

(b) In that case bonds were issued to pay for the cost of the improvement, presumably upon the faith which the village council had in the efficacy of the petition. In this case bonds were issued upon the faith of the county commissioners in the petition and other acts of the complainants. Yet, in that case, the Supreme Court did not give any weight to that fact against the property owners. The printed report of that case does not disclose the fact that bonds were issued, but, if opposite counsel challenge our statement, we will furnish the court a copy of the pamphlet record which does show it.

Judge Coxe's opinion, in 98 Fed. Rep., 369, is in accord with the opinion of our own Supreme Court on this question, and its quotation is appropos:

"Second. *A petition for an improvement is not a petition for an illegal assessment.* In all the company's acts" (the company was the property owner and plaintiff), "there is nothing inconsistent with the theory *that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation, or to the taking of its property for public use without compensation.*"

A quotation from the opinion of Judge Williams in the Birdseye case is also appropriate to this part of the discussion:

> "A further claim is made, in support of the judgment below, that the plaintiffs are estopped from contesting the assessment against their property, because, with knowledge that the improvement was under construction, they suffered it to proceed to completion without objection, but, if all of the plaintiffs are not so estopped, those of them are estopped who signed the petition that was presented to the council requesting the improvement to be made. * * * This acquiescence on their part would be sufficient to estop them from *attacking the validity of those proceedings.* But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed, and they promptly interposed with their injunction as soon as they learned the assessment exceeded twenty-five per cent. of the taxable value of their lots. Silence *or assent to the making of the improvement*, could not operate as an estoppel to challenge the correctness of the assessment; for, until the plaintiffs had knowledge of the assessment, it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise would require them not only to take notice at their peril of the illegal action of the public authorities, but to anticipate that in every official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to the proper assessment against their property legally imposed, *and it can hardly be supposed that the plaintiffs who signed the petition for the improvement intended thereby to donate their entire property to the public, or what is practically the same thing, consent to an assessment that would amount to its confiscation.* They evidently contemplated that some special benefit would accrue to them from the construction of the improvement, *which possibly could not be the case if the substantial value of their property were taken to pay the assessment laid upon it.*"

Till they knew what the assessment was, and how it was levied, the appellants here in the case now being argued, had a right to assume that it would be made in obedience to the

organic, as well as the statutory law; they had a right to assume that it would not be levied in violation of the positive prohibitions of the constitutions of the United States and the state; that is to say, the provisions which forbade an assessment, not based on the consideration of special benefits, and which forbade an assessment in excess of special benefits, and the taking of property for public use without compensation.

A broad principle is announced in the syllabus of Birdseye vs. Clyde. It is comprehensive enough to warrant the contention that no act of the property owner, done before the assessment is levied, even though it had promoted the improvement, should estop him from attacking the assessment, because it is illegal, *or because it confiscates his property, or takes it for public use without compensation.* If the assessment here was illegal, as it surely was, under the application of the decision in Norwood vs. Baker, then none of the acts of estoppel relied upon here have any merit as estoppel against the assessment. *Such acts do foreclose the property owner's right to attack the validity of the improvement, but not to assail the assessment.* This distinction is made conspicuous in Birdseye vs. Clyde.

We ask Your Honors to note the terms of the petition in Birdseye vs. Clyde. In express terms it prayed for an assessment to be levied upon the property of the petitioners—an assessment which was illegal, which exceeded the limit fixed by statute. Yet the Supreme Court declared this was no estoppel where the assessment is assailed.

And we ask the court to observe that in Lyon vs. Town of Tonawanda, supra, the complainant not only petitioned for the improvement, but it "ratified and confirmed the action of the town in making it." So the record says. (Pages 363, 98, Fed. Rep.) Yet that was not permitted to estop the plaintiff from impugning the assessment.

(2) These appellants, as the Alum Creek Ice Company, signed the agreement in regard to the circle. It is in the transcript of the evidence on page 71 of the record.

We insist that it was error to consider this agreement. The original was not offered in evidence; nor was its loss of destruction proved. Placing it on record in the commissioner's office did not dispense with its primary evidence.

Assuming that it was signed, though it is doubtful from the testimony of Dr. Sheperd, (page 74 of the record), a brief analysis of this agreement, and a consideration of the facts which inspired it, are necessary to an intelligent comprehension of its meaning. The internal evidence of the agreement itself shows very plainly that the property owners objected to a continuation of the improvement, because they apprehended that the cost of removing the dirt from the circle, and the cost of beautifying and adorning it were to be assessed upon the property owners; thereupon, the Columbus Land Association, which owned most of the land along the improvement, proposed and agreed, by the first part of the paper in evidence, that it would pay these two items of cost, if the improvement was permitted to go on. To this the property owners assented, and they signed this paper (page 71 of record) a paper by which they agreed to withdraw all objections to the improvement, and "an assessment of their property." But it would be both illogical and illegal to construe that into an agreement that their property should be illegally assessed, or confiscated, as it practically was. They said, by this paper, that they withdrew all objections to an assessment of their property. But that is no more intense in its meaning than their petition for the improvement was; for the petition prayed that their property should be assessed, just as the plaintiffs did in Birdseye vs. Clyde, supra, and as the plaintiffs did in the Tonawanda case. This

agreement was nothing more than a reiteration of the prayer of their original petition. Why, then, should it have any different effect?

The cost of constructing the circle was not, as the court can readily observe, involved in this transaction. Not a dollar was added to the cost of the improvement, in whole or in part, by the execution of this agreement, nor by any action taken under it by the commissioners. Hence the county was not injured by it, and the act of executing the paper lacks an essential element of estoppel.

It can be easily perceived that the cost of an improvement of a street or road, with a circle in it, would be much greater than a street without a circle; but not a word is said in this agreement about that additional cost. If this additional cost was not originally estimated, as we admit, then, by a freedom of construction which is exceedingly questionable, this agreement might be construed as a recognition of the circle. We will argue this view later in the brief.

(3) Some of the original complainants, not all of them, signed a petition asking the county commissioners to alter the contract with the contractor so as to release him from sodding the sides of the improved roadways. (Page 72 of record.) Their object was to enable the property owners to sow grass seed where the sod was to be put on. It is obvious that this did not increase, but, on the contrary, diminished, the cost of the improvement. The county was not, therefore, injured by the act of the complainants or the action taken under its influence. Their act was not promotive of the improvement.

(4) The Alum Creek Ice Company, by McLeish, signed a petition asking for the construction of sewers. (Page 73 of record.) But this cannot be construed as having any of the lineaments of estoppel, because the uncontradicted and

undisputed testimony of Walter Braun (page 85 of the record) proved that this was not done until the next year after the improvement of the road was completed. His testimony further proved that the cost of the sewers was not embraced in the assessment which these complainants are, in this suit, challenging. Braun was the officer who had charge, supervision, of the improvement of the road and the sewers, and who made out the assessment sheet. This makes his testimony most trustworthy. The cost of the sewers not being embraced in the assessment here assailed, and the sewers not having been constructed until the next year after the assessment was levied, the act of these appellants in signing the petition, asking for the construction of the sewers, cannot, by any straining of law or the imagination, be deemed an estoppel.

(5) Dr. Sheperd was a member of the board of improvement provided for by the 13th section of the act. The court will observe that, by the act, this board had no other function to perform than to appoint a superintendent. The board was not vested with any power to superintend or direct the improvement, or the contractor or the superintendent. The statute is not ambiguous on this subject. Besides the testimony of Dr. Sheperd proves that neither the board to which he belonged, nor he as a part of it, exercised any control over the improvement or gave any directions about it to either the superintendent or the contractor. This board never had a meeting, except to appoint the superintendent. (Page 82 of the record.)

Before the board, of which Dr. Sheperd was a member, was appointed, the county commissioners had directed the improvement of the road to be made. The improvement would have gone on if Dr. Sheperd had not served upon that board; the board could not have stopped the improvement.

His service on the board was not "active promotion" of the improvement, in the sense in which this term is used in the Tone and Mitchell cases. There the plaintiffs who served on the board of commissioners, actively participated in the improvement by prescribing the plan and specifications for the improvement, by advertising for bids, by making the contract with the contractor, by superintending the work and by levying the assessment. That sort of conduct is what the Supreme Court characterized as "active promotion" of the work. It is true that signing the petition was also designated in those cases by the same term; but the decision in Birdseye vs. Clyde, supra, cannot be reconciled with those cases, on this topic, except by regarding it as having modified the others.

In Columbus vs. Slyh, 44 O. S., 484, the court said:

"We perceive no essential difference between petitioning for the improvement and participating in the election of commissioners." (Page 484). Hence, if, as the same court decided in the Clyde case, signing such a petition does not estop the petitioner from assisting the assessment how can Dr. Sheperd's participation in the election of commissioners, as he did by being elected, estop him from attaching the assessment here?

If the expense of a superintendent was estimated in the cost of the improvement, by which the county commissioners arrived at the conclusion that the rate of assessment should be $7.25 per foot front, the appointment of the superintendent by the board of which Dr. Sheperd was a member, did not add a dollar to the cost of the improvement. *If this is true, the county was not injured by this alleged act of estoppel.* It did not mislead the commissioners thereof into doing anything that made the county suffer a loss.

The appellee did not offer a particle of testimony to show

that the cost of the superintendent was not included in the original estimate of the cost of the improvement, or that there was anything added to the cost of the improvement by the appointment of a superintendent.

To meet the view that the doctor's service on the board might be construed to be an estoppel, we offered the evidence which shows what the superintendent received for his services. (Page 88 of Record). It was $186. In the context of this brief we will argue its relevancy.

(6) Sheperd and McLeish, but not Carr, signed the petition asking the county commissioners to extend the time for the payment of the bonds from ten to twenty years.

It also appears in evidence, (page 75 of the record) that Sheperd, Mitchell and McLeish, as the board of improvement, adopted a resolution of similar purport. As a board they had no power to adopt such a resolution. How McLeish came to sign, as a member of the board, there is no evidence to explain. He never was a member of the board; the record of the county commissioners, which is in evidence, shows that J. C. Lunn was the third member. There is absolutely no evidence that McLeish was ever a member of it.

But there was absolutely no estoppel in either of these acts, because the undisputed evidence is, that the county commissioners never acted upon the petition or resolution; the time for the payment of the bonds was not extended. (See Sheperd's evidence, page 75 of record.)

The county commissioners, not having acted upon either one, the petition or the resolution, those acts lack one of the essential elements of equitable estoppel. (2 Pom. Eq. Juris., Sec. 812.)

(7) The last paper which it is claimed the appellants, or either of them, signed, is styled a waiver. It is found in the record, on pages 75 and 76. An analysis of this document

cannot but be helpful. It has a preamble which recites that a petition for the improvement was signed and presented to the county commissioners. It describes the road to be improved; it states that the county commissioners acted upon the petition; it designates the act of the legislature under which this was done, and then, lastly, it recites that the petition and all the other original papers had been lost or mislaid. Then follows the agreement signed by the property owners. It states that in order that the bonds to be issued may not lie under suspicion, or remain unsold, *by reason of the loss of these papers*, they agree that they will not set up as a defense against the assessment for the payment of the bonds, *any informality arising from the absence or loss of any of said papers*, and that they *will not set up as a defense that the improvement was illegally made and constructed*. That is all there is in this paper.

These complainants have religiously lived up to this paper. They have not violated either one of the two stipulations in it.

(a) They are not interposing as a defense against the assessment any informality arising from the absence or loss of any papers.

(b) They are not interposing as a cause of action or as a defense against the assessment, that the *improvement was illegally made and constructed*. They make no attack on the legality of the improvement proceedings. *The cause of action is that the assessment was not legally made*. The agreement which they signed does not restrain or estop them from maintaining the action on this ground. In the very nature of things they could not have contemplated such a condition; *because, at that time, the assessment had not been levied*. They could not then know that the assessment would be obnoxious to any legal objection. This agreement of the appellants can not be tortured into meaning that they thereby consented that their

property might be illegally assessed, or confiscated, or taken for public use without compensation, and that if that was done, they would not resist it. It is not capable of any such construction. It is, therefore, perfectly innocuous, as evidence of estoppel against the complainants.

The testimony of Emil Kiesewetter (page 101 of Record), discloses that he was the agent of the bondholders who bought the first issue of $50,000 of the bonds, and that he relied upon this agreement. We objected to this testimony on the ground that the bondholders were not parties to this suit, and we filed a motion to suppress his testimony on this ground. (Page 109 of Record). It is probably immaterial whether it was sustained or overruled; because the evidence that the appellants have not violated either the letter or spirit of the agreement, is undisputed.

(8) Defendant makes a feeble claim that two of the original complainants, Sheperd and McLeish, but not Carr, signed still another paper, which he calls a waiver. It is found on pages 94 and 95 of the Record.

We objected to the testimony because the original was not offered or its loss or destruction shown. (Record, 96).

(1) We moved to strike this testimony from the case for several reasons. (Record, 107 and 108).

(a) The bondholders were not parties to this suit.

(b) There was no proof of the loss or destruction of the original of this paper.

(c) There was absolutely not a particle of evidence that the appellants, or either of them, even signed this paper or its original. During the oral argument below, Mr. Dyer for the appellee, frankly admitted that there was no direct proof of the execution of this paper by Sheperd or McLeish, or either of them; but an indefinite, half-hearted claim was made that, as the paper was found recorded in the records of the county

commissioners, that was proof of its execution by them. At that time we thought, and still think, it would be an abuse of the patience of the court to argue, at length, against such a baseless proposition.

In the answer of the appellee, it is alleged and charged that the appellants executed this document; by the replication this was traversed. The burden of proving its execution, therefore, rested upon the appellee. Now, the appellee, in effect, says:

> "I have proved it, because I have put in evidence the record of the county commissioners which contains the copy of a paper purporting to be signed by the appellants and others."

The statement of the proposition is a refutation of itself. The stipulation (page 94 of the record) goes no further than an agreement that this paper "is a copy of the county commissioner's record." The record does not pretend to assert that this paper was signed by the property owners, nor does the stipulation admit that it was so signed.

The copy of the record is merely proof of what is in the commissioners record. It is no proof of, it has not the remotest tendency to prove, the genuineness or authenticity of the document copied into the record.

This so-called waiver is a private writing, and not a public document.

There is no positive statute which commands or even authorizes it to be spread upon the records of the county commissioners. Being a private writing, the rule of Primariness in evidence law required that the original should be produced, or its absence accounted for when its contents are sought to be put in evidence. Its contents can only be proved by the writing itself—the writing which was executed by the parties. Secondary evidence, such as copies and oral

recollections of the contents, is only admissible after proof of loss or destruction of the original has been produced.

This rule is inexorable, but it was not obeyed in this case.

Here is a much stronger case before the court. The appellants deny that they executed such a paper. The appellee therefore was required:

(1) To produce the writing that was executed by the appellants, and

(2) To prove its execution by them.

We have said there was no positive statute which either required or even authorized this paper to be put on the record of the county commissioners, but to meet the contention in another way, we are going to waive, for the time, this objection. Section 1021 of the Revised Statutes of Ohio makes the auditor secretary of the county commissioners, and requires him to "keep an accurate record of all their proceedings," and to "carefully preserve all documents, books, records, maps and papers, *required* to be deposited and kept in his office."

Section 850 of the same statutes provides that the "record book" "shall be received as evidence in every court in the state." Assume that this paper was one of those "documents" or "papers," which the auditor was required to "carefully preserve," and we are willing to assume that receiving the paper and acting upon it by the commissioners, was part of their "proceedings," of which the auditor had to "keep an accurate record."

But all this does not prove that the complainants executed the paper. Adopting the most liberal view, the copy of the record only proves three facts:

(1) That such a paper purporting to be signed by the persons whose names are attached to it was presented to the county commissioners;

(2) That they acted upon the paper;

(3) That they had it spread upon their records.

But all this falls short of proof of the execution of it by the appellants.

The statute of Ohio authorizes deeds and mortgages to be recorded. A mortgage purporting to be executed by A to B was brought by B to the recorder and was by this officer recorded. B brings a foreclosure suit. A, in his answer, denies that he executed the mortgage. B offers, on this issue, a certified copy of the mortgage and of its recordation, and then rests. Would any court decide that he had proved the execution of the mortgage by A?

This identical question in reference to the record of a deed as evidence was decided by the Supreme Court of Ohio in Walsh vs. Barron, 24 Ohio St., 28. The third paragraph of the syllabus embodies the decision. To prove the execution of a deed the defendants in error, in the lower court, offered the "record of the deed," and the argument was exactly like Mr. Dyer's oral argument below in this case was, namely, that the record was admissible without proof of the instrument recorded. On this Judge McElvaine observed:

> *"The signature of the president of the corporation to such a deed does not prove itself. * * * It was error, therefore, to admit the deed without proof of its execution by the president of the corporation.*
>
> "It is suggested by defendants in error that, in fact, the record of the deed from the office of the recorder of Hamilton county was the instrument offered, and not the deed; and that the record was admissible without proof of the execution of the instrument recorded. To this suggestion it is sufficient to say, that the bill of exceptions shows that the deed itself was the objectionable instrument admitted, and we are not at liberty to question the verity of the record."

One of the questions passed upon by the court in that case was not only parallel to the one now being discussed; it was identical with it.

(9) For the purpose of presenting every possible view of the document and waiver, discussed in the last paragraph, we are going to assume, but not admit, that it is genuine. During the oral argument below it was stated, by opposite counsel, that the second issue of bonds, for $60,000, was not made until after the improvement was finished. The bill alleges that it was made August 1, 1891, and the answer admits this by not denying it; but we are willing to accept the statement of counsel as to when the bonds were really issued to the bondholders. At that time the work had been finished; the contractor had performed all the conditions of his contract; the county commissioners, or the county, were liable to him for his contract price; there was nothing these appellants could do that would change this legal-relation between the contractor and the county commissioners.

The execution of this paper did not induce or constrain the commissioners to add one dollar to the cost of the improvement. That cost had already been incurred and was irrevocably fixed.

If such a paper had not been signed by the property owners, the county commissioners would not have been released from their obligation to the contractor. The signing of this paper and its presentation to the county commissioners did not put them in any better situation. They would have been obliged to either issue bonds to pay the contract price, or order it paid from the general fund of the county. If this paper had never been executed or heard of, if it had not been executed, the commissioners could not have used any means, they could not have taken any action, to retrieve their position and save themselves from issuing the bonds, or paying the contractor out of the general fund. There were no such means accessible, and no such action "lay in their power."

If this alleged estoppel were not enforced against the ap-

pellants, the action of the county commissioners in issuing the $60,000 of bonds would not change their legal position for the worse.

From this analysis of the paper, therefore, it is clear that there is lacking an essential element of estoppel. (2 Pom. Eq. Juris., Sec. 812.)

Again, no bondholder, or his agent, testified that he acted upon this paper in taking this issue of bonds.

Not a syllable of evidence on this subject is in the record. There is not a syllable of testimony that these appellants, or either of them, made any representation to the contractor upon which he relied and acted.

There is not a single syllable of testimony tending to prove that these complainants, or either of them, made any representations or assurances to any person which induced that person to purchase the issue of $60,000 of bonds, or any part of said bonds.

From this standpoint, therefore, this case may be assimilated to the case of O'Brien vs. Wheelock, supra.

(10) We have already stated in this brief that we should largely rely upon the decision in O'Brien vs. Wheelock, 95 Fed. Rep., 883.

It is not in harmony with the decisions in the Mitchell and Tone cases; but so far as it conflicts with them we assume that this court will follow its leadings, instead of the state decisions. This case was decided by Justice Harlan and Judge Woods. In its facts, it is a close relation to the case at bar.

The statute of Illinois authorized the construction and protection of drains, ditches, levees, and other works. Upon the filing of a petition signed by the owners or occupants of the land, stating certain required facts, the county court, after determining that a drain, ditch, or levee, was necessary,

was authorized to appoint three commissioners for the improvement; the commissioners were required to examine the land sought to be drained or protected, and to determine given questions, one being whether the expense would equal the benefits. A jury had to assess the damages and benefits. It was the duty of the commissioners to survey, lay out, construct, repair, alter, clean, protect and maintain the drain, ditch, or levee. They were authorized to borrow money, not exceeding the assessment, to pay the cost, and to secure the same by notes or bonds; and it was their function to collect the assessment levied upon the lands to pay the cost. In three counties, Adams, Pike and Calhoun, drains, ditches and a levee were constructed, under this statute. Wheelock and Jones, two of the defendants in the case from which we quote, were two of the commissioners. They were also land owners. They caused the drains, ditches, and levee to be constructed. Bonds were sold and an assessment was levied by them. The Supreme Court of the State of Illinois adjudged the statute unconstitutional. Subsequently the constitution was so changed and amended that such a statute would be valid. Again, the legislature labored, and brought forth another statute, almost exactly like the other one, except that it provided for the formation of drainage districts. A drainage district was formed under the statute, which included the drains, ditches and levee constructed under the other statute, and to the county court, the commissioners, under the first statute, surrendered the levee.

In the meantime a suit was instituted by one Palms, a bondholder, for himself and other bondholders, in the United States Circuit Court. In his bill the history of the legislation and of the levee was given; it was alleged that the money arising from the bonds was used in constructing the levee; that the bonds were unpaid; that the land owners and

commissioners still keep and use the works, the levee, to protect their lands; that they refused to pay and collect the assessments and apply them to the payment of the bonds; that the land owners knew, at the time, that they were enjoying the use of the levee, that the money arising from the sale of the bonds was used to build the levee; that the state courts refused to give effect to the statute authorizing the improvement. The prayer was for an accounting of money paid by the bondholders; of the manner of its application, and for the impressment of a lien upon the assessments to secure the amount due upon the works and upon the assessment, and for an order commanding the commissioners to collect the assessment and to pay them over to the bondholders, and also commanding them to take possession and control of the works.

The commissioners answered, averring the refusal of the land owners to pay the assessments; the bringing of suits in the state courts to test the validity of the statute; and the decision of the State Supreme Court adverse to the law.

The decree entered by the court is stated on pages 896 and 897 of the report. Among other things it decreed that the amount due the bondholders was a lien upon the assessments: *that the bondholders should have the liberty to prosecute, in the name of the commissioners, suits for the collection of the assessments.*

Afterwards, Palms died. Thereupon his executors brought the suit in the United States Court which Justice Harlan and Judge Woods decided, making the surviving commissioners and numerous land owners defendants. The contents of their bill is recited on pages 889, 900 and 901 of the report.

Several averments of the bill we emphasize for the purposes of this argument.

(a) That the defendants who had acquired their lands after the assessment was levied, did so with knowledge that the money of the bondholders had been used to pay for the levee; that with such knowledge they had used the levee for the protection of their lands.

(b) That certain of the defendants, including the commissioners, "participated in causing said bonds to be issued and sold and the proceeds expended by actively soliciting the passage of the act of 1871." (The statute declared unconstitutional by the State Supreme Court.)

(c) That the provisions of the statute were made known to the land owners. (Dr. Sheperd was closely questioned in this case about his knowledge of the Ohio suburban statute, pages 78 and 79 of record.)

(d) That certain other defendants "participated in causing said bonds to be issued and sold to plaintiff's testator, and the proceeds to be expended in the construction of the levee, and in causing the said assessments to be made by signing the petition to the Pike county court"; that certain land owners, defendants, "participated in procuring the bonds to be sold by signing * * * a petition for a *second assessment.*"

(e) That the defendants, through Charles M. Clark, procured the passage by the legislature of the (invalid statute) and *"devised a plan for the organization of a corporation composed of persons interested in the lands, for the purpose of raising money to put the act into effect; that a large part of the defendants subscribed to the capital stock of that corporation in order to effect the objects of its creation."*

(Was there ever a case of more "active promotion" of an improvement?)

The act of estoppel imputed to Dr. Sheperd in this case at bar, consisting of his service on the board that appointed the

superintendent, pales into insignificance when compared with the acts of estoppel set up in the bill in the case just quoted from, against the commissioners there.

The other alleged acts of estoppel charged to all of these complainants are not nearly as intense in meaning as some of those charged against the property owners in the case quoted from.

Under the decisions in the Mitchell and Tone cases, supra, our state courts might have shut the door of equity in the faces of property owners who had done such acts as were done by the commissioners and land owners in the Illinois case.

But the United States Circuit Court of Appeals, composed, as we have stated, of Justice Harlan and Judge Woods, adopted a different view of the alleged estoppel conduct. The judgment of the Circuit Court, dismissing the bill of the bondholders, was affirmed; the reply of estoppel was smitten with a heavy hand. Justice Harlan's opinion of the estoppel issue is instructive. We quote some of it.

"But it is contended that, even if the act of 1871 be held to be unconstitutional, the plaintiffs are entitled to relief against all the defendants who have received a valuable consideration through the statute procured by their own consent, or subsequently sanctioned by them, and by which they derived an interest. Some authorities are cited which apparently support this view. But, when carefully examined, they do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by the present record. All who had any connection with the passage of the act of 1871, or who desired its passage, acted, as we may assume, in good faith, and in the firm belief that its provisions were not inconsistent with the constitution of the state. It cannot be said that anyone was guilty of fraud. *No assurances of any affirmative character were given by the land owners to those who constructed the*

work, or to those who, like Palms, purchased the bonds after they were executed and delivered to the contractors. The land owners, the contractors and the purchasers of bonds, all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. *It is a case of an honest mistake as to the competency of the legislature to do what it attempted to do, no one being misled by the assurances and representations of others.* The entire argument of learned counsel for the plaintiffs on this part of the case, leaves out of view, or assumes to be of no consequence whatever, the fact, apparent on the face of the act of 1871, that what the land owners, proceeding under it, had in view, was not simply to have a levee constructed, *but to have a sufficient levee, which could be repaired from time to time and permanently maintained under legal authority. In the very nature of things, it cannot be supposed that any land owner would have become connected with the scheme embodied in the act of* 1871, *unless the maintenance of the levee by competent legal authority was assured.* It is therefore unjust to the land owners, to say anything more than that they assented to the construction of the levee. If they are deemed to have assented to anything, it must be further said that they assented to the scheme under which the levee was to be construct d *and maintained*, under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. The system devised by the act of 1871 is to be looked at in its entirety. We cannot put out of view any vital part of it, and hold the land owners who acted in good faith, *and who gave no personal assurances, and made no representations*, responsible for the results to others flowing from invalid legislation and the partial execution of the original plan. If it be said that the plaintiff's testator would never have purchased the bonds except in the belief that the act of 1871 was valid, with equal

truth it may be said that the land owners never sought or desired such legislation, except in the belief that the levee would be maintained by the same authority that constructed it." (Pages 906 and 907 of the report).

The observations of Justice Harlan touching the motive, the impulse of the land owners—that is, that they acted on the belief that the levee would be maintained—is strikingly applicable to the case at bar.

By the 16th section of the Ohio statute, provision was made for a board of control whose duty it was to keep the improved street or road in repair. The section in full is as follows:

> Section 16. On the completion of the improvement of any road or street under the provisions of this act, the commissioners shall appoint a board of control for said roadway, to consist of three of the property owners of the lands abutting upon said improvement, who shall serve without compensation, and have charge of the repairs and condition of said improved road. Said board shall be appointed to serve two years, or until their successors are duly appointed and qualified. Said commissioners shall fill any vacancy that may occur in said board by an appointment for such unexpired term. Said board shall see that said improved roadway is kept clean and in good repair, and all expenses incurred by said board in such work shall be by them returned to the auditor of the county in a written report of said board, to wit: On the first Tuesday of January, of each year, together with an itemized statement of the expenses incurred by said board, which sum, if deemed correct and proper by said auditor, shall be by him assessed per foot front on all property abutting on said improvement; such assessment, until paid, shall be a lien, as other expenses of making said improved road."

In Bennignus vs. The County Treasurer of this county, a case involving the validity of the same assessment, (62 O. S., 666), the Supreme Court of Ohio adjudged that this statute was unconstitutional, just as the Illinois Supreme Court declared the statute of that state void. The reason assigned was

that it violated Section 26 of Article 2 of the Ohio Constitution That renders the statute invalid for all purposes. Nothing whatever can be done under the act. A board of control to maintain and keep the road in repair cannot be appointed; till additional legislation is enacted, the road will be neglected and fall into decay.

The property owners, as well as the bondholders and the county commissioners, did not get what they contemplated. When these appellants gave their consent by signing the petition and other papers, they gave it upon a condition. The assent was not only given to the construction of the improvement; paraphrasing Justice Harlan, their assent was also given to a scheme under which an improved road was to be "constructed and maintained," under the authority of law, from time to time, and so as to accomplish the results contemplated by the legislature. By reason of the decision of the State Supreme Court this condition upon which they gave their consent has utterly failed.

We submit, and respectfully insist, that under the decision in O'Brien vs. Wheelock there is no merit in the defense of estoppel interposed in this case by the treasurer. Under both the letter and spirit of that case the defendant has ignominiously failed to make out a case of estoppel against these complainants.

It can not be differentiated from this case at bar because it was a suit by bondholders, as opposite counsel try to do. The bondholders were given permission to prosecute the suit in the name of the commissioners, and it was so prosecuted.

We now present another view of the estoppel issue. *The undisputed evidence shows that, before the contract was made and before the improvement was begun, the county commissioners estimated its cost, and that they ordered that its cost should be $7.25 per foot front.* The property owners had the

right to assume that this cost would be the limit of the assessment, unless it should be increased by their own conduct. We have proved, by the overwhelming weight of the evidence, that the assessment of $11.25 per foot front, which was levied, was largely in excess of the special benefits; in fact, one witness, Carr, who no longer has any interest in the issue of this suit, testified, without objection, that he would not accept the land as a gift, if the gift was made upon the condition that he should pay the balance of the assessment that is unpaid. (Record, 99). The defendant really examined only one witness on this issue—Mr. Heffner.

Tracy, the defendant's witness, testified that he bought a lot after the improvement had been completed, which was one hundred feet wide, for the price of $75.00 per foot front. Much reliance is placed upon this testimony by the defendant. Against this evidence we proved by Martin (page 24 of the evidence of complainants) that after the improvement was completed, one-half of the Stansberry lot sold for $1000 per acre, which was $6.35 per front foot. The Stansberry property had a frontage of 555 feet. (Page 33 of Record). So that, while one lot having a frontage of 100 feet sold for $75 per foot front, a lot having a frontage of 555 feet sold for $6.35 per foot front. That more than neutralizes the testimony offered by the defendant. If the sales made, after the improvement was finished, are to fix the value of the property, showing its increase in value, the preponderance is decidedly upon our side.

The undisputed testimony establishes that the appellants, in order to make their property conveniently accessible, after the road had been finished, had to spend, and did spend, over or about $2000 for dirt to make fillings. (Pages 38 and 62 of Record). This testimony makes this case again resemble the case of O'Brien vs. Wheelock, supra. The following quotation from the opinion will manifest the truth of this statement:

> "It is said that the defendants are in the actual enjoyment of the work done under the act of 1871, and therefore they are equitably bound to pay for it. In what sense are they in the enjoyment of such work? There was evidence tending to show—indeed, we think the weight of the evidence was—that the levee built under the act of 1871 was not adequately constructed. At any rate it broke in 1876 and left the land intended to be benefited in a condition almost as bad as when the act of 1871 was passed. Fences, improvements and houses were washed away, entailing large losses upon land owners."

So we ask in this case, in what sense were the appellants benefited by the improvement? The improvement left their property in such a condition that they had to make an expenditure of $5000 to enable them to use the road in connection with their property.

Some of the witnesses went so far as to say that the improvement was no special benefit at all to the land of the complainants. All of the witnesses to whom the answer was put agreed that the complainants had paid more than the value of the special benefits.

The constitutional limit to the assessment was the value of the special benefits to the land. That limitation has been established by both the United States Supreme Court (Norwood vs. Baker) and by our own Supreme Court. (Walsh vs. Barron, 61 O. S., 15).

After the commissioners entered into the contract with the contractor for the construction of the improvement, the property owners could not have had the improvement enjoined, no matter how much they might have been dissatisfied with, or wronged by it; because the contract rights of the contractor had intervened.

Now, we are going to assume, but not admit, that the complainants committed acts of estoppel which induced the county commissioners to add some costs to the original estimated cost of the improvement. By the wildest strain-

ing of the law and facts there were only two of those acts. One was the appointment of a superintendent by the board of improvement. The cost of this officer we have shown was only $186.00. (Page 88 of the record.)

The other act was the agreement concerning the circle. The additional cost of the circle, we have shown, was $8030. (Page 88 of record.) The whole frontage assessed was 9615 feet. (Page 87 of the record.) Distribute this additional cost along the frontage of 9615 feet, and it amounts to $.854 per foot front. That added to $7.25 per foot, makes an aggregate of $8.104-10. Appellants have paid of principal $8810.27, being $7.87 per foot front on their frontage. They have paid of interest $3170.95. This added to the principal would make $11,981.22. They have, therefore, paid in all, $10.70 per foot front.

Giving them credit for the interest paid, they have paid enough to more than equal the original cost of the improvement, and the added cost also; in truth, they have paid an excess of $2.60 per foot front. If they are not entitled to credit for the interest paid, then, they only owe $.231-10 per foot front, which would aggregate on their entire frontage $261.78. In no event ought they to be required to pay any more than this sum.

This view of the estoppel is fully sustained by the decision of the Circuit Court of Hamilton county, Ohio, in Storer vs. Cincinnati, 4 C. C., 278, which was afterwards affirmed by the Supreme Court, 24 W. Law Bulletin, 371.

Is there any reason why they should not be entitled to credit for the interest?

(1) If the assessment had not been an illegal one, in amount, they would not have been required to pay so much interest.

(2) If the principal of the assessment was excessive

originally, certainly they ought to be entitled to credit for the interest they paid on the excess above the limit of special benefits.

VI.

DEFENSE OF LACHES.

It may be argued that the appellants had been guilty of laches, in this, that they had delayed unreasonably in bringing their suit. They may allude to the facts that eight years had elapsed since the assessment was levied, and that the appellants had paid six installments of the assessment.

(a) The decisive answer to a defense of laches, that there has been an unreasonable delay in applying for a remedy to redress a wrong is ignorance of rights, *whether of fact or law.*

> *Brown* vs. *Sutton*, 129 U. S., 238;
> *Hammond* vs. *Hopkins*, 143 U. S., 224.

The testimony of all the appellants discloses that none of them knew about their legal rights, based on the fact that the assessment was illegal, and that the law was unconstitutional, until just a short time before this suit was brought.

(b) They were not obliged to sue until an effort was made to collect the assessment. This identical question was decided in Columbus against Agler, 44 O. S., 485. It is an unsyllabused case, but the pertinent part of the opinion is this:

> "She" (plaintiff) "was not called upon to do anything until steps were taken to make the assessment upon her property."

This question was again decided by the Supreme Court in Lewis vs. Taylor, 61 O. S., 471. There the court said that the plaintiff, who had not promoted the improvement, was not obliged to so sue till "an attempt is made to enforce the assessment." "He is not required," it was further said, "to

begin such suit at an earlier day, though he may know of the improvement and of the intention to make the assessment."

(c) The defendant has no right to complain of the delay, because it was no injury to him. The more delay there was, the more the installments of the assessment which were paid. The delay was a benefit, an advantage to the county. Laches is only a defense when the defendant was harmed by it. In Cincinnati vs. James, 55 O. S., 180, it was decided that the voluntary payment of six installments of an assessment was not a bar to a suit for injunction against the rest of them, if they were illegal.

VII.

It may be urged that this court should follow the decisions of the state courts. Certainly it is not necessary to combat this proposition so far as it relates to the question, whether the assessment was legal; that is to say, whether it was a violation of the Fourteenth Amendment to the Constitution of the United States.

Nor is there any more necessity for arguing it so far as it relates to the estoppel branch. The question of estoppel is not a question of local law. It is not a question about the construction of the state constitution, or a state statute. It is only on questions of this character that the United States courts are obliged to follow the decisions of the state courts.

The question of estoppel is one of general law, of general jurisprudence, and upon such a question the federal courts exercise their own independent judgment. The solution of the question of estoppel must be worked out by the aid of "general principles, and common to all courts." See Olcott vs. The Supervisors, 16 Wall, 678.

VIII.

We will now answer the contention of the defendant that the new complainants, Thomas McLeish and Joseph Bush, who, since the suit was brought, bought the undivided one-third of Leonard Carr in the land, and assumed to pay the assessments upon it, are estopped by reason of such assumption from challenging the validity of the assessment.

(a) To sustain their contention, the only authority appealed to was the unreported case, Caldwell against City of Columbus. 37 W. L. Bull., 270.

We contend that the Ohio Supreme Court in a later case has, in effect, decided the question the opposite way. We refer to the case already cited of Lewis vs. Taylor, supra. There were three cases decided by the court at the same time. In two of them, (Lewis vs. Symmes, and Bader et al. vs. The C. P. & B. Ry Co.,) this same question was agitated in the Circuit Court. (18 Circuit Court Reports, 448.) It was pleaded by the answer in the first named case that French, a lessee, had agreed to pay all taxes, assessments, etc., that had been assessed on the land; and in the other, that the plaintiff, the railroad company, which had purchased the land after the assessment was levied, had agreed to pay the assessment. In the first case a motion for a judgment on the pleadings, and in the second a demurrer to the answer, were sustained by the Circuit Court. In the pamphlet record printed in the Supreme Court these two rulings of the Circuit Court were assigned as errors by the petitions in error. The judgments of the Circuit Court were affirmed by the Supreme Court. It is true the Supreme Court did not discuss this question in the opinion. Nor does the syllabus mention it. The same thing is true of the decision in Caldwell against the City of Columbus;

for there was neither syllabus nor opinion. The truth is that neither side can derive much aid from any of these cases.

Against this contention of the defendant, which we are now trying to answer, we cite the case of State vs. Jersey City, 35 N. J. L., 381. There the purchaser of land promised to pay the assessments which were legal liens on the property he bought. The fourth paragraph of the syllabus states the true rule in a clear, concise and emphatic manner:

> "If a purchaser takes title to lands with knowledge of assessments against them while held by a former owner, and assumes to pay them in his deed, he may object to the legality of these assessments, in an action between him and the city, and the purchaser under the city."

In the opinion it is stated that the conclusion of the court is rested upon the principle that the purchaser only intended to pay legal liens, but if the assessments were illegal, there were no legal liens.

That is all that Thomas McLeish and Joseph Bush meant to do. In contemplation of law they only intended to pay the liens that *were legal:* indeed, the assumption clause in the deed expressly limits their promise to pay such assessments, taxes, etc., as were legal liens.

In another part of the opinion this is said:

> "A person who purchases subject to a mortgage and assumes to pay it, may still make any legal defense to a suit thereon. * * * *The principle is the same in the case of any similar encumbrance or charge upon land claimed by either party.*" (Page 385).

(6) The same principles of estoppel which we invoked in another part of this brief, should be applied to the solution of this question. It must be proved by the estoppel-asserter that he relied and acted upon the act of estoppel committed by the other party. This case is barren of any evidence on this point. The treasurer neither relied nor acted upon the promise of

Thomas J. McLeish and Joseph Bush to Leonard Carr; nor did the county commissioners. They could not have relied or acted upon it. Counsel for the other side will not deny the proposition, that no personal obligation rested upon the property owners to pay the assessment levied under the suburban statute.

In Dreake against Beasley, 26 O. S., 315, this question was decided, the court saying that they "understand the law to be that no taxes assessed upon land can be collected by a personal action against the owner, unless they are by law made a charge against him."

The assessment in that case was for the improvement of a road. In the statute under which the assessment in controversy here was levied, there is no provision making the assessment a personal obligation of the property owner.

Leonard Carr, being under no personal obligation to pay the asessment, the promise of his grantees, Thomas J. McLeish and Joseph Bush was, and is, a mere nudum pactum, and cannot be enforced either by Leonard Carr or by the treasurer. (Brewer vs. Maurier, 38 O. S., 550).

It is too firmly embedded in the law to be unsettled now, that to make the promise of the grantee of land to pay a mortgage available, his grantor must be personally liable for the payment of the mortgage debt. Crowell vs. St. Barnabas Hospital, 27 N. J. E., 656, in which such a decision was rendered, is approvingly cited by the United States Supreme Court in Keller vs. Ashford, 133 U. S., 610. The decisions concurring with this one are so numerous that it would require pages to state their titles.

That the rule is the same where the grantee assumes to pay any other liens such as assessments or taxes, needs no further support of authority.

See the two cases cited before. (State vs. Jersey City, Brewer vs. Maurier.)

(c) We appeal again to the decision in O'Brien against Wheelock, supra, to put down this contention of the defendant. There one of the allegations of the second bill of the bondholders was "*that certain other defendants had acquired title to some of said lands, by accepting deeds of conveyance expressly recognizing the liens of plaintiffs on said tracts.*" That means that such defendants recognized the liens of the assessment by promising to pay them, making it an exactly identical case with this. This recognition was relied upon by the bondholders as an estoppel against the land owners. They claimed that it prevented the defendant land owners from pleading the unconstitutionality of the statute. But, with all the other estoppels relied upon by them, this estoppel went down under the decision of Justice Harlan and Judge Wood.

REPLY TO ARGUMENTS OF OPPOSING COUNSEL WHICH ARE ANTICIPATED.

Opposite counsel may argue, as they did in the lower court, that the appellants never presented any claim for damages under Sections 3 and 4 of the statute. But their failure to present such a claim does not bar them from asserting the claim for relief against the assessment; they are not asking for damages in this case; they are not asking for compensation for any property taken.

The supposed contention of opposite counsel that the statute provided for due process of law, that due process of law was not denied to the complainants, and that the board of county commissioners was a tribunal invested with power to hear evidence, etc., is met and overthrown by the decision of the Circuit Court of the United States, in the case of *San Mateo* vs. *The Southern Pacific Railroad Company*, 13 Fed.

Rep., 722, and *Charles* vs. *City of Marion*, 98 Fed. Rep., 166, cited by us in our original brief.

Opposite counsel may argue that the "property of the appellants is especially benefited to an amount equal to the cost of the improvement, if not to an amount largely in excess of the cost thereof." It seems to us that it would require a great deal of temerity to make such an assertion in face of the fact that opposite counsel examined, in fact, only one witness upon the issue of special benefits; and the meaning of their assertion would be, that the testimony of that one witness is of more value than the testimony of all the witnesses for the appellants.

Opposite counsel may say that no appeal, as provided in Section 4687, et seq., Revised Statutes of Ohio, was taken by complainants from the orders and findings of the county commissioners above specified.

The sections referred to provide for appeals from final orders made by the county commissioners, establishing a county road, or altering or vacating a state or county road, or changing the width of a county road. They make no provision whatever for an appeal, in a case like the one now under consideration. In the case at bar the county commissioners did not establish a county road; nor did they alter or vacate a state or county road. The appellants are not asking for relief against an order establishing a county road, or vacating a state or county road, or changing the width of a county road; they are asking for relief against an order making an assessment upon their property; and these statutes make no provision whatever for an appeal from such an order.

The special statute under which the county commissioners acted is entirely independent of the general statutes as to roads.

The interpretation which opposite counsel will put upon the decision in *Norwood* vs. *Baker* will be too narrow. The court not only decided that private property could not be charged with an assessment in excess of special benefits, and that such an assessment would be taking private property, without just compensation; but it also decided, and decided just as unequivocally, that an assessment made by the foot front imports in itself that it was not in proportion to special benefits. This latter point cannot be obscured by quoting some of the court's opinion, and omitting all the rest.

Opposite counsel may say that the complainants had a right to present a claim for damages if their property was damaged by reason of the elevation of grade. But they had other rights, too; they had a right to have the assessment apportioned among the different abutting owners in proportion to the benefits derived by each owner's property from the improvement. That right is entirely separate and independent, from the right to present a claim for damages. The failure to present a claim for damages does not effect their right to have the assessment apportioned as the Constitution requires; that is to say, in proportion to special benefits. The decision in Norwood vs. Baker declares that the abutting property owner has two rights as to the assessment: First, the right to have it assessed in proportion to the special benefits between him and the public at large; and second, the right to have it apportioned in proportion to the relative special benefits, between him and the other abutting property owners.

The proposition that, when the benefit to the property of A is greater than the benefit to the property of B; because of the favorable or unfavorable location of the properties belonging to these parties, it is an unfortunate circumstance merely, does not harmonize with the decision in Norwood

against Baker. This court says there that when such a condition exists between A and B, that the assessment must be according to the relative special benefits, and that a failure to observe the rule is a violation of the constitutional right of B.

Opposite counsel fall back on the cases of *State* vs. *Mitchell*, 31 O. S., 592; *Tone* vs. *Columbus*, 39 O. S., 281; *Columbus* vs. *Sohl*, 44 O. S., 482; and *Columbus* vs. *Slygh*, 44 O. S., 484.

We have already tried to point out the vital distinction between these cases, and the case at bar, and the case of *Birdseye* vs. *Clyde*, cited in our brief. In those four cases, while the complaint was made against assessments, they were not illegal assessments. They were assessments made under an unconstitutional law, but the assessments themselves did not violate any constitutional or legal right of the property owners. It was not till the case of Birdseye against Clyde was reached that the court was called upon to decide the question, whether the property owner was obliged to pay an assessment which in itself violated some legal or constitutional right. In the first four cases mentioned, the court decided that the property owners who petitioned for the improvement, or participated in the election of commissioners to make the assessment, were estopped from objecting to the assessment, although it was made under an unconstitutional law; but in *Birdseye* vs. *Clyde*, there is an additional feature: the assessment expressly violated a legal right of the property owner in regard to its limit; and the court held that the owner's act of petitioning for the improvement, *although a waiver of objections to the legality of the improvement proceeding, was not a waiver of his right to have the assessment made according to law. That is precisely the contention in the case at bar.* Appellants petitioned, and they did other acts which estopped them from questioning the

legality of the improvement proceedings; but these acts do not estop them from challenging the assessment on the ground that it violated their constitutional rights, to wit:

(1) That the assessment was made regardless of the special benefits conferred; and

(2) That it was made in excess of the special benefits conferred.

These are just as much legal limits on the power of assessment as was the twenty-five per cent. limit, in *Birdseye* vs. *Clyde*. The right to have his property assessed in proportion to benefits, and to have the assessment no greater than the special benefits, is just as sacred as the right to have the assessment kept within the twenty-five per cent. limit fixed by statute. If there is any difference between them, they are more sacred than the other, because they are guaranteed by the Constitution, and not by statute, as is the twenty-five per cent. limit.

In the four cases upon which counsel rest, the question whether the *assessment itself violated* any legal or constitutional right, we repeat, was neither agitated before, nor decided by, the court.

Opposite counsel labor industriously to prove that the Federal courts will follow decisions of state courts where they have thereby established rules of property. But the four decisions of the Supreme Court of Ohio, relied upon by the opposite side, do not establish rules of property: the mere statement of their decisions proves this to be true. They decided that when a property owner petitions for an improvement of a street on which his property abuts, or participates in the election of commissioners whose office it was to make the improvement, and levy the assessment, he was estopped from challenging the assessment. How can such decisions be tortured into decisions establishing rules

of property? The rights and corresponding duties created by such estoppel conduct are simply those of contract, and not of property.

This court has jurisdiction of this case; because there is a federal question involved; because the suit arises under the Constitution; because a statute of the state contravenes the Constitution of the United States. The Supreme Court of the State of Ohio has never decided that a party who brings such a suit is estopped from challenging the validity of the statute, or of the acts done pursuant to it by reason of conduct which is construed to be estoppel in its character; the Supreme Court of the state would have no authority to render such a decision. Whether a party who brings a suit in the United States Court is barred of his right to question the constitutionality of a statute, under the Constitution of the United States, by estoppel conduct, is a question of which the Federal courts have exclusive cognizance.

Counsel on the other side cite numerous cases, but this precise question did not arise, and was not decided, in either of them. To show the fallacy of the contention by opposite counsel, it will be necessary to analyze some of the cases, as samples of all of them.

In *Orvis* vs. *Powell*, 98 U. S., 176, which was on error from the State Supreme Court, it was merely decided that a rule of property established by decisions of the state courts was binding on the United States Court sitting in that state; there was no question of estoppel decided; nor was it decided that estoppel conduct would bar one from questioning the validity of the state under the United States Constitution.

In *Beaupre* vs. *Noyes et al.*, 11 U. S., Sup. Ct. Rep., 296, which was also on error from the State Supreme Court, it was simply decided that, inasmuch as no federal question was

involved, the decision of the Supreme Court of the state disposed of the case; and in *Electric Co.* vs. *Dow*, 17 U. S. Sup. Ct. Rep., 645, the court simply refused to review the decision of the Supreme Court of the state because it was not based on any federal question. In neither of the two cases last named was it decided that when a complainant is held by the state court to be estopped, that he can get no relief in the Federal Court, as opposite counsel may interpret them.

Eustis vs. *Bolles*, 150 U. S., 361, may also be cited by counsel. That was on error to a decision of the Supreme Court of a state. The court merely decided that, unless the decision of the federal question by the State Court was necessary to the determination of the cause, the United States Supreme Court would not entertain jurisdiction.

The case of *Marrow* vs. *Brinkley*, 9 Supt. Ct. Rep., 267, is also a case on error to the Supreme Court of Virginia; and the resolution of the court was that, since it appeared that the decision of a federal question was not necessary to the determination of the cause by the State Court, and that such question was not actually decided, and that the judgment as rendered could have been given without deciding it, the United States Supreme Court would not review the decision of the State Supreme Court.

The cases of *Adams County* vs. *B. & M. R. R. Co.*, 112 U. S., 123; and *State ex rel.* vs. *F. & P. M. R. Co.*, 14 Sup. Ct. Rep., 586, are also cases on error from the State Supreme Courts. The court resolved that, as only a question of estoppel was decided by the State Supreme Court, and as it was broad enough to control the rights of the parties without disposing of the federal question, the decision would not be reviewed.

It does not seem necessary to consume any further time in discussing the numerous cases which may be cited by

opposite counsel. Each one of them merely decided when the United States Supreme Court will, and when it will not, review a decision of the state court in which there was a federal or non-federal question involved, and that when the decision of the latter question was broad enough to control all the rights of the parties, it would not be reviewed by the United States Supreme Court.

But the case at bar is brought in the United States Circuit Court, not in a state court. Therefore, these cases should not guide or control this court. The complainants raise a federal question. The defendant cannot deprive them of the right to have that question decided by pleading a defense that raises a non-federal question. That does not excuse the court from deciding the federal question. 102 U. S. Rep., 141; *Sawyer* vs. *Parish* &c., 12 Fed. Rep., 754, (8 par. of syllabus). A decision by this court of the question raised by the defense of estoppel, in favor of the defendant and against the complainant, would necessarily decide the federal question against the complainants.

Opposite counsel may say that the complainants can ask no greater relief from the courts of the United States than they could obtain were they to resort to the state court, and that, if, in the latter case, equity would afford no relief, the Federal Courts would give none. That involves the assumption that the state courts would deny the appellants relief. That they could not do, if they followed the decision in *Birdseye* vs. *Clyde*. The case which may be cited by counsel, *Ewing* vs. *St. Louis*, 5 Wall, 413, does not sustain their proposition. The complainant asked a court of equity to give him relief against the determination of an inferior board of special jurisdiction. In the state courts the review and correction of such a proceeding had to be obtained by a writ of certio-

rari. This court decided that a complainant could get no greater relief than this from the United States Court.

It may be asserted that there is no question made by the appellants as to the validity of the statute under consideration, or that the assessments violated any provision of the Constitution of the state. In the bill it is expressly alleged that the statute had been decided to be unconstitutional by all three of the courts of Ohio; the answer admitted that it had been so decided by the Common Pleas and Circuit Court, but denied that there had been such a decision by the Supreme Court. Opposite counsel will not dispute our statement that such a decision had been rendered by the Supreme Court in the case of *Bennington* vs. *Barron*, supra.

To the second and third points we answer that in the Johnson case, decided in 55 O. S., cited before, the assessment was not assailed until after several installments of the assessment had been paid. That fact did not deprive the complainant of the relief to which he was entitled. A similar decision was rendered by the Ohio Supreme Court in *Lewis* vs. *Symmes*.

It may be insisted that the appellants, by their petition, "adopted and acquiesced in each and every provision of the act," and that they agreed with the county and the purchasers of the bonds that the cost of the improvement should be assessed by the foot front. The petitioners in Birdseye against Clyde, the case which we have before cited, by their petition assented to all of such acts; and yet their mouths were not shut when they complained that the assessment was illegal.

If the cases of *Treasurer* vs. *Martin*, 50 O. S., 197, and *Mott* vs. *Hubbard*, 59 O. S., 199, should be cited, our answer is, that they are merely disciples of State vs. Mitchell, Tone vs. Columbus, Columbus vs. Sohl, and Columbus vs. Slygh, before cited; they go no farther than these cases went.

There is no ingenuity that can run a parallel between those cases, on the one side, and the case of Birdseye against Clyde, and the case at bar, on the other side. Here the appellants are attacking the assessment on the ground that it exceeds constitutional limits. By the United States Constitution the county commissioners were limited in levying assessments upon the property of the complainants, to one method namely, an assessment in proportion to special benefits, and in levying their assessment they were also limited, by the said Constitution, to an assessment that equaled the special benefits. The county commissioners trancended these limits. In Birdseye vs. Clyde, the village was circumscribed, in levying the assessment, by a statutory limit of twenty-five per cent. of the value of the property. The facts of that case, and the facts of the case at bar, make them exactly parallel; and any effort on the part of opposite counsel to show that we are wrong in this contention will be vain.

Making an application of this to the case at bar, there can be no essential difference perceived between the act of the complainants petitioning for the improvement, and the other subsequent acts which are imputed to them as estoppel conduct. If the other subsequent acts have no greater force and virtue as estoppel than the act of petitioning for the improvement, then, under the decision in Birdseye against Clyde, it logically follows that the complainants are not estopped, by such subsequent acts of so-called estoppel, from disputing the validity of the assessment.

Opposite counsel may undertake to perform the feat of showing that the decisions of the Supreme Court of the United States antecedent to the case of Norwood against Baker, sustain front foot assessments, and there are seventeen cases to which they may appeal. To show how confused they would be if they do this, it is only necessary to invite the court's atten-

tion to two of the cases cited: *Spencer* vs. *Merchant*, 125 U. S., 345, and *Walston* vs. *Nevin*, 128 U. S., 578. In Norwood against Baker, the same contention was urged upon the Supreme Court by counsel for the Village of Norwood; that is to say, that the other cases, especially Spencer against Merchant, supra, should control the decision of the case. But the court did not assent to that; on the contrary, it said this: "Nor do we think that the present case is necessarily controlled by the decision in Spencer vs. Merchant, 125 U. S., 345." The court distinguished it from Norwood against Baker. By looking at the case of Walston vs. Nevin, 128 U. S., 578, it will be seen that the court followed three or four of the other cases upon which we suppose opposite counsel will rely, Spencer vs. Merchant being at the head of the list. If Spencer vs. Merchant is distinguishable from the case of Norwood against Baker, so is Walston vs. Nevin and all the other cases relied upon by counsel.

An attempt may be made to differentiate the case of O'Brien vs. Wheelock, 95 Fed. Rep., 883, from the case at bar. All of the quotations from the opinion of Justice Harlan, which will probably be quoted, except the last one, relate expressly to the question as to whether the court should follow the decision of the Supreme Court of Illinois. The observations in these quotations have no relevancy whatever to the question of estoppel upon which we cited the case.

An attempt to enfeeble the decision in Birdseye against Clyde, as an authority in our favor, may be made, by observing that the petitioner in that case did nothing to promote the improvement, except to sign a petition. But that will overlook the fact that in one of the previous Ohio cases, Columbus against Slygh, 44 O. S., 484, the court had said that there was no essential difference between a petitioning for the improvement and participating in the election of commissioners to

carry the plan into execution. There is no act of estoppel imputed to the appellants in the case at bar that is more intense in meaning than a participation in the election of commissioners to carry out the plan of execution.

The claim will probably be made that the Federal courts have applied the rule of estoppel as broadly as the Supreme Court of Ohio; but it is not supported by the authorities. With the exception of one or two of the cases which will perhaps be cited, all of the cases involve situations where if estoppel had not been applied, fraud would have been permitted.

The case of Daniels vs. Tearney, 102 U. S., 415, it is true, involves the application of the principle of estoppel to conduct in pursuance of a statute which violated the Federal Constitution, a secession statute, but is clearly distinguishable from the case at bar. The party estopped knew that the act was unconstitutional before acting under it. The bond which he executed was for the payment of a claim valid against him and which it would have been a fraud to permit him to dispute. In the present case, the appellants did not know that the act was unconstitutional; nor is the claim a valid one against them, because it was not assessed according to any principle of special benefits, and exceeds such benefits, and is a demand of something for nothing.

The case of *Electric Co.* vs. *Dow*, 166 U. S., 489, was dismissed by this court because no federal question was involved and is therefore not in point.

In discussing estoppel, opposite counsel will omit a most important fact, namely, that the commissioners, in ordering the improvement to be made, estimated and fixed the cost at $7.25 per foot. (Record, 90). Every alleged act of estoppel done after that order was made was done with reference to the cost of the road thus fixed, and on the faith of appellants that the limit would be observed. Every time they did an act

which is now construed to be estoppel by our opponents, the appellants had a right to assume that the road would cost only $7.25 per foot, and not $11.25.

As to the two sewers petitioned for and built, they will forget that the uncontradicted evidence of the engineer shows that that was not done until the next year after the assessment, which the appellants are now attacking, was levied, and also the next year after the improvement was finished.

This evidence also shows that the cost of the sewer was not a part of the assessment here assailed. How, then, can it be said that the Commissioners were induced to make the improvement of the road and levy an assessment by an act which was done a year after both the improvement was made and the assessment levied? There is no element of estoppel in the act.

Opposite counsel will dwell on the fact that appellants joined in a petition asking the Commissioners to extend the period for the payment of the bonds to twenty years.

But the evidence shows that the County Commissioners never acted upon the petition. (Page 75 of Record). How, then, can that act be tortured into an estoppel? The Commissioners never having relied upon, or acted upon it, and never having been induced to do anything, to change the position of the county for the worse, it has no element of estoppel.

They will dwell upon the written communication in which the appellant withdrew objection to the improvement and the assessment of their real estate. That is to say, the appellants withdrew all objection to an assessment that should equal the estimate, the cost of the improvement, $7.25, previously fixed by the Commissioners. That communication can not be perverted into meaning that they thereby authorized the Commissioners to levy any kind of an assessment upon their property, and especially an assessment that would exceed the value of

their property, as the evidence conclusively shows—an assessment which amounts to confiscation.

They will also mention as an act of estoppel the petition asking for the cancellation of that part of the contract which required the contractor to sod the sides of the roadway.

But defendants did not show that that act added a dollar to the cost of the improvement; on the contrary, it is manifest that it decreased the cost. Moreover, the petition was signed and preferred with reference to the fact that the improvement was to cost $7.25 per foot.

They will also mention, as an act of estoppel, that one of the appellants served as a member of the board appointed by the Commissioners. But that board had no function to perform other than electing the superintendent. It had no control over the work, or over the superintendent and contractor, or the assessment. Besides the act was done with reference to the cost of the improvement, at $7.25 per foot, and upon the presumption that it would not exceed that sum.

They will also mention as an act of estoppel the payment by the appellant of seven installments of the assessment levied upon their property.

But how can that be construed to be an estoppel? The payment of so much of the assessment was a benefit, and not an injury, to the county. The appellants were obliged to pay $7.25 per foot front; and if they paid any more, it was a benefit to the county. One of the essential elements of an estoppel is that the estoppel-asserter must "sustain actual damage," if the estoppel is not enforced. In Railroad Co. vs. DuBois, 12 Wall., 47, this court decided that the estoppel-asserter must have been misled "to his hurt" by the act of estoppel.

Bispham's Equity, Sec. 291.

How can it be said that the county was misled to its hurt, or that it was actually damaged, as other cases put it, by the appellants paying seven installments of the assessment?

Precisely the same reflections apply to the alleged act of estoppel, namely, that the appellants remained silent from 1891 until 1899. The longer they remained silent, the more installments of the assessment were paid; and the Supreme Court of the state has decided, as we showed, that the payment of the installments was not an estoppel.

Opposite counsel may appeal to the lengthy paper which was filed with the Commissioners, and which purports to be signed by two of the appellants, as an act of estoppel. (Record, 94). It purports to be an agreement upon their part that they would not set up a defense against the collection of any assessment upon their property. They say it was signed and filed on March 31, 1890. The record does not disclose any such date; on the contrary, it can easily be inferred from the record (pages 109, 110 and 111) that it was not signed until in August or September, 1891, about the time the improvement was completed, if it was ever signed at all; *but the record shows that neither of the appellants ever signed the paper.* There was an absolute failure of proof of its authenticity and genuineness, on the part of the appellee. There was such an absolute want of evidence that the lower court did not consider it as an act of estoppel. We refer to the opinion of Judge Thompson. (Record, 110).

They may characterize the decision in French vs. Barber Asphalt Paving Co., supra, as a departure from some supposed rule that had existed prior thereto; and they assume that the Supreme Court in French vs. Barber Asphalt Paving Co. returned to the doctrine from which there had been a departure in the other case. But in none of these subsequent cases did the court reverse or modify the decision in

Norwood vs. Baker. On the contrary, in the French case, it was expressly stated that "Courts of equity are always open to afford a remedy, where there is an attempt under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law."

And it was expressly stated that the case of Norwood vs. Baker belonged to that category of cases. In one of the other of that group of cases, Town of Tonawanda vs. Lyon, the court expressly deferred to the decision in Norwood vs. Baker, and stated that "a case of actual confiscation of private property to public use" should be decided by the precedent of Norwood vs. Baker.

True, in French vs. Barber Asphalt Paving Co., the court did say that a denial, by the statute, of a preliminary hearing as to special benefits, did not constitute a taking of property without due process of law. But it was not decided that when an assessment had been made in excess of special benefits, that the property owner would not be entitled to relief in an appropriate action or suit.

Opposite counsel may quote, with satisfaction to themselves, the passage from the opinion of Justice Shiras in Detroit vs. Parker, another of the same group of cases, in which it was stated that it had not been shown that the property of the complainants in that case "had been charged differently from that of other lot owners."

But they will ignore the evidence in the case at bar when they state that this applies to this case. The undisputed evidence shows that the property of the appellants was worth less per foot front than other property along the same improvement; that none of the property along the east end of the improvement was injured in any degree by the excavation for the road, but on the contrary that it was left as "nice terrace property." The evidence conclusively shows that

the property of the appellants was depressed from ten to fourteen feet below the road, by reason of the improvement, and that to make their property accessible, they had to spend $5,000 for dirt to make a fill, so that the land would be on a grade with the road. None of this evidence for the appellants was contradicted. Moreover, the evidence of the appellee corroborates the evidence of the appellants, that there was a gross inequality in value between the property of the appellants and most of the other property along the improvement; and yet the county commissioners levied the same rate of assessment upon their property as they did upon the other property which had not been injured by the excavation for the road. How, in the face of these facts, can it be said that the property of the appellants had not been "charged differently from that of other lot owners?"

It may be argued, that the legislature may provide a definite rule of apportioning the benefits resulting from the paving of a street, and that property owners are not entitled to notice or hearing at the time the assessment is made. But the decisions in these cases do not preclude the appellants from obtaining relief against the collection of an illegal assessment, which has been made, for such right the statute, Section 5848 of the Revised Statutes of Ohio, confers.

They may argue that the statute itself provided that the commissioners should estimate the special benefits. We have anticipated and endeavored to answer this argument. They will not attempt to reconcile Section 17 of the act with Sections 6 and 8 of the act, which expressly commanded the commissioners to make the assessment by the front foot method. So, that even if the commissioners had found, as they ought to have found, that the different property owners would not be equally benefited by the improvement, that all the abutting property would not be uniformly benefited

by it, they could not have made a different assessment on the appellants' property from that made on the property of other lot owners. It had to be the same on each piece of property; the commissioners could not do it otherwise, without violating the mandate of those sections. Further, the record does not show that the commissioners made an apportionment of the special benefits.

What they did was not a performance of that duty at all, according to the decision in Chamberlain vs. Cleveland, 34 O. S., 551. The commissioners found what the value of the property was before, and what it would probably be after, the improvement; but they did not ascertain the amount, the value, of the special benefits, nor did they apportion the burden among the different tracts of property according to the relative benefits.

It may be said that "six separate and written applications for changes and additions to the improvement" were filed by these appellants, and others, with the commissioners. The record does not show any such condition of fact. It may be claimed that the commissioners were induced by the estoppel conduct of the appellants, to sell bonds to the amount of $110,000. But, if the decision of the State Supreme Court in Birdseye vs. Clyde is of any value, this fact is immaterial. The bonds there were issued by the council in reliance upon the petition of the property owners for the improvement. *The property owners suffered the improvement to proceed to completion without objection*, it was said in the opinion. The court expressly decided that their acquiescence in the improvement did not mean anything more than this, that they were obliged to submit to a legal assessment; that it was not equitable to assume, from their acquiescence in the construction of the improvement, and from their silence in not objecting to it, before it was completed, by

injunction or otherwise, that the lot owners intended to donate their property to the public, or that they intended to consent to the confiscation of their property. So we say in this case at bar that, when the appellants signed the petition about the circle, and the waiver, on pages 75 and 76 of the record, and when they made no objection to the issuance of the bonds, they did not intend to do anything more than submit to a legal assessment upon their property; that is, in this case, to $7.25 per foot front; that it would be inequitable to assume, from these acts, that they intended to donate their property to the public, or that it should be confiscated for the benefit of the public.

What was done by the commissioners after the improvements began may be exaggerated; it may be intimated that there were a number of changes and modifications in the plans and specifications. The evidence does not show any such condition of fact. The only changes made were in regard to sodding the side walks and the circle. It will be admitted that if the county, or the commissioners, as assumed agents of the property owners, exceeded their authority, the property owners would not be bound by their acts. They did exceed their authority, when they made an assessment in excess of $7.25 per foot front. They had substantially agreed with the property owners that the assessment should not exceed that amount; the property owners had a right to rely upon that; and, as between them and ther agent, so-called, they are not obliged to pay an assessment that exceeded that amount, unless they did some act which required a larger expenditure of money.

We have already discussed this phase of the case and sustained the propositions, there stated, by a decision of the Supreme Court of the state in Storer vs. Cincinnati, 4 C. C., 278; 24 Weekly Law Bulletin, 371. If the construction of

the circle made the cost exceed $7.25 per foot front, under the ruling in that case, the appellants would have to help pay for it; but, it is equally true, that the ruling there forbade the commissioners making an assessment for anything more than that cost, above the $7.25 per foot.

If, as the opposite counsel contend, this court will follow the decisions of the state court, we are contented; provided, the court will follow the pertinent decision of the State Court in the Storer case.

In Wight vs. Davidson, 181 U. S., 371, the Supreme Court did announce that the property owner might be estopped from questioning unjust taxation, by his estoppel conduct, but the passages from the opinion merely lay down the general rule. This rule does not, in any way affect the decision in O'Brien vs. Wheelock, 95 Fed. Rep., 883, to which we have appealed in this brief.

Opposite counsel may say that the manifest purpose of the appellants and others in signing and filling the petition, was "to cause the county commissioners to act in the premises, and to cause the improvement to be made in the manner and to the extent it was made." So did the petition in Birdseye vs. Clyde, still relief was given. In O'Brien vs. Wheelock the land owners were more active in promoting the improvement than the appellants were in the case at bar. They actively solicited the passage of the statute under which the improvement was made. They knew all about the provisions of the statute, more than Doctor Shepard, one of the appellants, knew about the Ohio statutes. There they "participated in causing the bonds to be issued and sold" to the purchasers; they caused the assessment to be made by signing the petition to the Pike county court; they "participated in procuring the bonds to be sold by signing a petition for the second assessment;" they also "devised a plan for the organization of a corporation composed of persons

interested in the lands," for the purpose of making the improvement authorized by the act. Yet none of these intense acts of estoppel, according to opposite counsel's philosophy, barred the right of the land owners to relief in the opinion of the Circuit Court of Appeals.

Again, we call attention to the fact, that one of the reasons given by Justice Harlan, for the conclusion of the court, has an intense application to the case at bar. The statute of Ohio, which authorized the improvement, provided that the road as improved should be maintained and kept up as an improved road, and by section 16 of the act there was a board of control provided for. When the appellants and other property owners committed the so-called acts of estoppel, they had a right to assume that the road would be kept up and maintained by that board, after it was completed; they acted upon their faith that such would be done. As Justice Harlan said in the case cited, "it cannot be supposed that any land owner would have become connected with the scheme embodied in the act" of the legislature, unless the maintenance of the improved road "was assured."

It may be said that the County Commissioners, in making the improvement, "were at all times absolutely passive in all they did in connection with this improvement." The property owners, however, had no control whatever over the improvement, as did the property owners, through their Commissioners, in the Tone and Mitchell cases.

In discussing the question, whether Thomas McLeish (it should be James McLeish) and Joseph Busch, two of the appellants, are entitled to any relief, because of the stipulation in the deed from Leonard Carr to them, providing that they should pay all assessments that might be liens upon the proprety, opposite counsel may assume that the case of Thompson vs. Thompson, 4 O. S., 333, is a precedent in favor of their

contention. But the court will observe that the decision was based upon the assumption that the purchaser was bound to indemnify his grantor against the incumbrance. In that case, if the purchaser had failed to pay the mortgage, the mortgagor would have been obliged to pay it as surety; he would have been personally liable; a judgment might have been rendered against him and execution issued against his other property. All this was based on the fact that there was a personal obligation owing by the mortgagor to the mortgagee for the payment of the debt. There is no such obligation in the case at bar. The statute expressly provides that the assessment shall be a lien upon the land; there could be no personal obligation resting upon the owner to pay the assessment, unless the statute so provided; but it made no provision to that effect; and this proposition can not be controverted by opposite counsel.

The same criticism is applicable to the case of Cramer vs. Leeper, 26 O. S., 59.

The case of Caldwell vs. Columbus, is not a precedent; because, in the case at bar, McLeish and Busch only agreed to pay *whatever assessments were legal liens upon the property.* If our contentions should be sustained, the assessment was not a legal lien upon the property which they purchased from Leonard Carr.

Opposite counsel, in discussing the case of Lewis, Auditor, vs. Taylor, 18 C. C., 443, will overlook the fact that there were three cases decided by the opinion rendered in that case, so that while what they may say about the assessment being placed on the tax duplicate after the lease was made, containing the assumption, is true, in the case of Lewis vs. Symmes' heirs, it is not true in the case of Lewis vs. Railroad Company. In the latter case there was an assumption of the assessment, contained in a deed for the land made subsequent to the assessment, and the placing of the same on the tax duplicate, for the court dis-

itnctly announces this opinion, stating the principle for which we contend:

"The railroad company, having agreed to pay assessments, the court in construing that contract would hold it to mean '*legal and valid assessments,*' and they would have the right to question and have determined by a competent court the validity of the assessment."

Moreover, the court said with reference to the Symmes case:

"In Symmes case we think that the lease to French makes no difference so far as this question is concerned. That was a contract between plaintiff below and French; that French agreed to pay assessments, and if these parties are ultimately compelled to pay these assessments, they would have a right to proceed against French to recover for the amount that they had paid. It in no way estops them from questioning or testing the validity of the assessment."

The court thus in no sense puts its decision in the Symmes case on the ground which opposite counsel claim that it does.

This defense, just discussed, is only made against two of the appellants.

In support of their contention that there was laches on the part of the appellants, opposite counsel may say that the twenty-foot strip of land was dedicated by the appellants and others. There is no evidence in the record to support that contention. They simply made no claim for damages.

They may also say that the record of the commissioners shows that the appellants consented to the proceedings taken in regard to the strips of land taken from the property of Miller and Benignus. They will simply quote from the record of the county commissioners. That simply shows what the commissioners found. Besides, the record of the commissioners only shows that the property holders consented to *the amount* that was found to be the value of the land taken from Miller and Benignus.

They may also say that Dr. Shepard testified that he knew the improvement was made under the act passed by the legislature on March 26, 1890, and that he, with others, asked the commissioners to make the improvement under that law. So did the land owners in Birdseye vs. Clyde, know of the statute, and so did the owners in O'Brien vs. Wheelock know of the statute; they actively solicited the passage of the statute; and yet, these were not held to be sufficient to bar them from relief in a court of equity against illegal assessments.

Opposite counsel may cite the case of Wright vs. Thomas, 26 O. S., 346. How does this case help the appellee? So far as it goes, it supports our side of the case, for the court decided that the complainant in that case was entitled to injunctive relief against the collection of the assessment, notwithstanding he delayed his action until the improvement was completed. The question was not before the court, and the court did not decide the question, how long he might have delayed his action after the work was completed. It is immaterial, therefore, whether the case has ever been overruled or modified.

The case of Kellog, Treas., etc., vs. Eli, 15 O. S., 64, may be relied upon by opposite counsel. But they will fail to state that one of the reasons for the conclusion of the court in that case was that, under the statutes, the land owner had the right to appeal, or go upon error, to the Common Pleas Court, from the decision of the county commissioners establishing the ditch. In the case at bar the appellants had no remedy from the decision of the county commissioners, either by appeal or error.

Again, the statement in the opinion, by implication at least, that the property owner should have warned the con-

tractors or laborers, is manifestly erroneous. That would not have availed anything in the case at bar. Just as soon as the contract was entered into between the county commissioners and the contractor, the contractural rights of the latter were fixed. There was nothing to complain about before the contract was entered into by the contractor. After the contract was made the property owners could not have had the improvement enjoined, because the contractural rights of the contractor had been fixed. This was expressly stated to be the rule in the Storer case by the Circuit Court of Cincinnati, and affirmed by the State Supreme Court.

Opposite counsel may put stress upon isolated parts of the testimony of Morrison, Martin, Orebaugh, Tracy and Heffner. But they cannot controvert our proposition that the evidence, by an overwhelming preponderance, shows that the property of the appellants was assessed nearly $500 more per acre than it was worth. The evidence which we have quoted in detail, not only the testimony of witnesses on our side, but some from their own side, cannot be overturned by simply mentioning the testimony of certain witnesses, and the pages on which their testimony may be found.

It may be said:

"The power to assess the property of appellants is limited only by the power conferred upon the county authorities to construct the improvement." But it will be admitted the statute which conferred that power "has been repeatedly held to be in conflict with the Constitution of Ohio." If the assessment made by the county commissioners was void, under the application of the decision in Norwood vs. Baker, there was no legal assessment. That is to say, if the assessment exceeded the special benefits, to the extent of the

excess, it was illegal. It was legal to the extent of the special benefits. The assessment, so far as it exceeded the special benefits, was just as much illegal as was the excess of the assessment above twenty-five per cent. of the value of the property, in the Birdseye case. There can be no sound distinction drawn between the two as illegal assessments.

Respectfully submitted,

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